No. _____

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In The

# Supreme Court of the United States

GEORGE MIYASHIRO,

*Petitioner,*

vs.

Honorable GEORGE M. MASUOKA, Judge in the trial court, and the SUPREME COURT OF THE STATE OF HAWAII,

*Respondents.*

**On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Hawaii**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Do the U.S. Constitutional due process protections contained in the Fifth and Fourteenth Amendments, as interpreted through applicable case law, require that Petitioner herein, George Miyashiro, be allowed to have counsel of his choice, Eugene J. Albertini represent him pro hac vice at trial here, when no required reasons for denial have been given?

## LIST OF PARTIES TO THE PROCEEDING

The petitioner in this case is GEORGE MIYASHIRO; the Respondents are the Honorable GEORGE M. MASUOKA, Judge in the trial court, and the SUPREME COURT OF THE STATE OF HAWAII, which denied the Petition for Writ of Mandamus.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| LIST OF PARTIES TO THE PROCEEDING | ii |
| TABLE OF CONTENTS | iii |
| TABLE OF AUTHORITIES | iv |
| PETITION FOR A WRIT OF CERTIORARI | 1 |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| CONSTITUTIONAL PROVISIONS INVOLVED | 2 |
| STATEMENT OF THE CASE | 2 |
| A. INTRODUCTION | 2 |
| B. BACKGROUND | 3 |
| REASONS FOR GRANTING THIS PETITION | 7 |
| A. THE HAWAIIAN COURTS ERRED BECAUSE THERE IS A CONSTITUTIONAL RIGHT TO CHOICE OF COUNSEL IN BOTH CIVIL AND CRIMINAL CASES | 7 |
| B. PLAINTIFF MIYASHIRO HAS A RIGHT TO HAVE ALBERTINI REPRESENT HIM AT TRIAL AND WAS WRONGFULLY DEPRIVED OF THAT RIGHT IN THIS CASE | 10 |
| CONCLUSION | 17 |
| APPENDICES | App. 1 |

## TABLE OF AUTHORITIES

Page

FEDERAL CASES

In re Bell South Corp., 334 F.2d 941 (11th Cir. 2003) ..... 10

In re Evans, 524 F.2d 1004 (5th Cir. 1975) ..... 12

Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) ..... 9

Gray v. New England Telephone and Telegraph Co., 792 F.3d 251 (1st Cir. 1986) ..... 8

McCuin v. Texas Power & Light Co., 714 F.2d 1255 (5th Cir. 1983) ..... 9

Panzardi-Alvarez v. United States, 879 F.2d 975 (1st Cir. 1989) ..... 10

Potashnick v. Port City Construction Co., 609 F.2d 1101 (5th Cir.), cert. denied, 449 U.S. 820, 101 S. Ct. 78, 66 L. Ed. 2d 22 (1980) ..... 8

Powell v. Alabama, 287 U.S. 45 (1932) ..... 8

Schlumberger Technologies, Inc. v. Wiley, 113 F.3d 1553 (11th Cir. 1997) ..... 11

Texas Catastrophe Property Ins. Ass'n v. Morales, 975 F.2d 1178 (5th Cir. 1992) ..... 8

U.S. v. Ferguson, 550 F. Supp. 1256 (S.D.N.Y. 1982) ..... 16

U.S. v. Gonzalez-Lopez, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006) ..... 9, 10

U.S. v. Locascio, 6 F.3d 924 (2d Cir. 1993) ..... 11

U.S. v. Pepper & Potter, Inc., 677 F. Supp. 123 (E.D.N.Y. 1988) ..... 16

TABLE OF AUTHORITIES – Continued

Page

UNITED STATES CONSTITUTION

Amendment V, of the U.S. Constitution ..... 2, 8, 17

Amendment VI, of the U.S. Constitution ..... 8, 17

Amendment XI, of the U.S. Constitution ..... 8

Amendment XIV, of the U.S. Constitution ..... 2, 17

FEDERAL STATUTES

28 U.S.C. § 1257(a) ..... 1

RULES OF THE SUPREME COURT OF THE UNITED STATES

Rule 13.1 ..... 1

Rule 13.3 ..... 1

## PETITION FOR A WRIT OF CERTIORARI

Petitioner GEORGE MIYASHIRO (hereinafter "MIYASHIRO"), the Plaintiff in MIYASHIRO v. ROEHRIG, ROEHRIG, WILSON & HARA, etc., et al., Circuit Court of the Third Circuit State of Hawaii, Case No.: 04-1-0211, respectfully petitions for a Writ of *Certiorari* to review the Order Denying Petition for Writ of Mandamus filed on November 1, 2006 in the Supreme Court of the State of Hawaii.

## OPINIONS BELOW

The Order Denying Petition for Writ of Mandamus filed on November 1, 2006 in the Supreme Court of the State of Hawaii is unreported and is therefore included herein as Appendix "A." MIYASHIRO's Petition for Writ of Mandamus to the Hawaii Supreme Court is attached hereto as Appendix "B."

## JURISDICTION

The Order Denying Petition for Writ of Mandamus was filed on November 1, 2006 in the Supreme Court of the State of Hawaii. This Petition to the Supreme Court is timely if filed on or before January 30, 2007. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a) and Supreme Court Rules 13.1 and 13.3.

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution states, in pertinent part, that no person shall " . . . be deprived of life, liberty, or property, without due process of law . . . . " The Fourteenth Amendment to the U.S. Constitution states, in pertinent part, " . . . nor shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." Fourteenth Amendment (a).

## STATEMENT OF THE CASE

### A. INTRODUCTION

This Petition arises out of a legal malpractice action in the State of Hawaii. As explained in his pleadings, MIYASHIRO was seriously abused by his counsel in a previous action, STANLEY H. ROEHRIG, ESQ. (hereinafter "ROEHRIG"). The Hawaii bar of attorneys is a relatively small and fairly cohesive group. ROEHRIG has, prior to representing MIYASHIRO, attained a position of some eminence, power and respect. As testament to his power and connections, after the case was filed, each of the judges in the Hawaii Third Circuit recused themselves; eventually a special judge had to be appointed by the Presiding Judge. Another result of ROEHRIG's position and stature caused difficulty for MIYASHIRO in locating counsel to represent him in his malpractice action. MIYASHIRO unsuccessfully interviewed literally scores of Honolulu, Big Island and other Hawaii attorneys in an effort to find counsel in the State of Hawaii to prosecute his malpractice action against ROEHRIG. MIYASHIRO did retain local counsel, DAVID J. GIERLACH, ESQ., but

with the understanding and expectation that EUGENE J. ALBERTINI, ESQ. ("ALBERTINI"), an experienced trial attorney in good standing in the State of California, would be granted *pro hac vice* status in Hawaii to conduct discovery in the matter, trial preparation and actually act as first chair trial counsel for the matter.

ALBERTINI was actually allowed to conduct discovery in the case (including depositions), but was denied the right to act as counsel for MIYASHIRO at trial. This first denial was initially made by one of the judges who later recused himself, Judge Ronald Ibarra, prior to his recusal; he obviously made a material and substantive decision he should arguably not have made in light of his later recusal. This denial of *pro hac vice* status for conduct of the trial was later upheld by the present judge, George M. Masuoka. A Petition for Writ of Mandamus to the Hawaii Supreme Court was made for the denial of *pro hac vice* status at trial, but it was denied. *See*, Appendix A. The Hawaii Supreme Court basically side-stepped the issue, focusing on the discretion of Judges Ibarra and Matsuoka to deny *pro hac vice* status to ALBERTINI to conduct the trial against ROEHRIG, rather than the transparently specious reasons given by Judge Ibarra for denying to MIYASHIRO his constitutional right to counsel of his choice, let alone the impropriety of Judge Ibarra making the ruling in light of the fact that he later recused himself in the matter.

## B. BACKGROUND

MIYASHIRO's allegations of malpractice against ROEHRIG are serious and ROEHRIG's alleged acts of malpractice are many. It is manifest that seldom has a

client been as abused by his attorney as MIYASHIRO has been by ROEHRIG. The allegations include multiple violations of the Rules of Professional Conduct in Hawaii including, without limitation: simultaneous representation of multiple clients despite manifest conflicts of interest; conspiring with others against his client; divulging confidential client information to adversarial parties in violation of the attorney-client privilege; giving advice and counsel to unrepresented and adversarial parties; acting against the interests and instructions of his client; acting without the consultation and input of his client; improperly retaining client property against the client's wishes; taking a position adverse to his client and his client's interests; testifying against his client and his client's interests; using client assets to fund litigation against that same client; and other breaches of duties, including the duty of loyalty ROEHRIG owed to MIYASHIRO. Unfortunately, ROEHRIG has been also practicing for many years in the State of Hawaii and has held political offices of power and influence. The Hawaii Bar is relatively small and close-knit. MIYASHIRO had great difficulty in finding an attorney to help him seek redress against the rather influential ROEHRIG. It should be noted that, after the case was filed, each of the judges in the Third Circuit Courts for the State of Hawaii recused themselves from hearing the case, another testament to the pervasive contacts of ROEHRIG. The Presiding Judge finally appointed a special judge, the present one, the Honorable George M. Masuoka.

Even prior to filing the complaint in this case, MIYASHIRO retained the services of ALBERTINI. ALBERTINI engaged in substantial investigation of the facts and documents related to the matter. ALBERTINI reviewed

over twenty boxes of documents, interviewed witnesses and conducted other "due diligence" investigation to satisfy himself that a good-faith case existed against ROEHRIG. After the case was filed, each of the judges for the Third Circuit Court of Hawaii recused themselves from hearing this case. The recusals included the Honorable Ronald Ibarra. However, Judge Ibarra did not recuse himself until after he had heard and denied the motion to allow ALBERTINI to appear as counsel *pro hac vice*. Judge Ibarra cited the following reasons to deny ALBERTINI *pro hac vice* status:

> He had been an attorney *pro hac vice* four other times in 11 years; he could still be retained as a consultant or paralegal; Gierlach is competent to handle complex trials; and Mr. Miyashiro did not show of the total bar population in the State of Hawaii that he could not obtain another lawyer to assist Gierlach in the handling of the case.

In light of Judge Ibarra's comment that MIYASHIRO had not exhausted his efforts to find local counsel to try the case, MIYASHIRO then again undertook an exhaustive effort to contact counsel throughout the State of Hawaii seeking representation in this case; in fact he contacted virtually every trial attorney on the big island of Hawaii and was turned down by them all. He then filed, on November 22, 2004, a second motion before Judge Ibarra to allow ALBERTINI to appear as *pro hac vice* for purposes of the trial. Therein, MIYASHIRO delineated his exhaustive efforts to find local counsel to try this case. Those efforts were unsuccessful. On December 8, 2004, Judge Ibarra recused himself from this case before ruling on the second motion.

On December 14, 2004, the Hawaii Supreme Court assigned the Honorable George M. Masuoka as the Presiding Judge in this case. The motion to permit ALBERTINI to appear *pro hac vice* came on for hearing before Judge Masuoka on April 6, 2005. Because of the importance to MIYASHIRO of ALBERTINI being able to play a significant role in the trial and preparation of this case, MIYASHIRO went to the remarkable extent of agreeing with the Defendants to dismiss Co-Defendants Judge Glenn Hara and the ROEHRIG Law Firm as Defendants in exchange for Defendants withdrawing their objection to ALBERTINI's *pro hac vice* status. During off the record discussions, Judge Masuoka said he would not agree to allow ALBERTINI full status at that time, i.e. participation at trial. The parties and the Judge then agreed that ALBERTINI would be permitted to participate in all non-court matters and the issue of his participation at the trial was to be reserved for further determination. In early May 2006, MIYASHIRO again raised the issue informally with Judge Masuoka at hearings on motions as to whether he would be inclined to grant ALBERTINI full status as *pro hac vice*. Judge Masuoka still declined.

Plaintiff renewed his request, for a third time, for admission of ALBERTINI full status *pro hac vice*. That motion came on for hearing on September 19, 2006. It was denied by Judge Masuoka. Judge Masuoka gave two reasons for the denial. First, he said he had the discretion to deny it and second, he tended to agree with judge Ibarra's reasoning in the original denial. MIYASHIRO thereupon, in October 2006, filed a Petition for Writ of Mandamus with the Supreme Court of Hawaii. A copy of this Petition, without exhibits, is attached hereto as Appendix "B." As indicated above, on November 1, 2006,

the Hawaii Supreme Court filed its denial of the Petition, based upon its conclusion that "there is no federal or state constitutional right to *pro hac vice* appearance of counsel before any Hawai'i [sic] state court" and therefore the trial court's denial of *pro hac vice* status was a matter of discretion for the trial court which the Supreme Court did not feel it could overturn and concluded that Judge Ibarra's initial ruling was correct.

## REASONS FOR GRANTING THIS PETITION

### A. THE HAWAIIAN COURTS ERRED BECAUSE THERE IS A CONSTITUTIONAL RIGHT TO CHOICE OF COUNSEL IN BOTH CIVIL AND CRIMINAL CASES.

In its order Denying Petition for Writ of Mandamus, Appendix A hereto, the Hawaii Supreme Court stated " . . . it appears that there is no federal or state constitutional right to *pro hac vice* appearance of counsel before any Hawaii state court." Counsel for ROEHRIG fostered this by incorrectly arguing that the right to counsel of choice only applied in criminal matters, but is not a correct statement of the law. Part of the problem is that the Hawaii Supreme Court was too focused on the right of ALBERTINI to be admitted *pro hac vice* in order to appear as lead counsel for MIYASHIRO in his forthcoming trial against ROEHRIG, arising out of ROEHRIG's alleged legal malpractice against MIYASHIRO. It is true that there are cases that suggest there may not be a constitutional "property" right to *pro hac vice* status for an attorney. There is, however, a well-established authority that there is a constitutional right to representation by counsel of one's choice in both criminal and civil cases under the

provisions of the Sixth (for criminal cases), Fifth and Eleventh Amendments to the U. S. Constitution. By denial of the application to allow ALBERTINI to appear for MIYASHIRO *pro hac vice* and denial of the petition for Writ of Mandamus, MIYASHIRO has effectively been deprived of his constitutional right.

It has been stated that the U.S. Constitution nowhere specifically says that a state cannot deprive persons of counsel in civil trials, but a number of cases have addressed the issue, and this Court has construed precedent to find a constitutional right to retain hired counsel. *See, Texas Catastrophe Property Ins. Ass'n v. Morales*, 975 F.2d 1178, 1180-1181 (5th Cir. 1992). This principle is not new. In this Court's decision in *Powell v. Alabama*, 287 U.S. 45, 64 (1932), it stated,

> If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

The court in *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1118 (5th Cir. 1980), clarified the principle and its basis, "In each instance, the right to counsel is one of constitutional dimensions and ***should thus be freely exercised without impingement***." (Emphasis added.) The court in *Gray v. New England Telephone and Telegraph Co.*, 792 F.3d 251, 257 (1st Cir. 1986) explained further,

> While right to counsel in the criminal and civil context are not identical, a civil litigant does have a constitutional right, deriving from due process, to retain hired counsel in a civil case. See *Potashnick v. Port City Construction Co.*, 609

> F.2d 1101, 1117-19 (5th Cir.), *cert. denied*, 449 U.S. 820, 101 S. Ct. 78, 66 L. Ed. 2d 22 (1980). This right has been considered so important that it has been extended to certain administrative proceedings as well. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) (in welfare benefits termination hearing, recipient must be allowed to retain an attorney if he so desires).

On this issue, the court in *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, 1262 (5th Cir. 1983), added, "Litigants do have a right to be represented by counsel and this ordinarily implies a right to lawyers of their choice. The right to counsel does not, however, entail absolute freedom of choice." The court explained,

> The right to counsel of one's choice may be overridden when 'compelling reasons exist.' The right should be balanced in cases in which it is challenged against the right to 'untainted prosecution of the lawsuit' and society's need to maintain the highest ethical standards of professional responsibility. It cannot be exercised without thought also to the needs of effective administration of justice. *Id.* at 1263.

In the recent case of *U.S. v. Gonzalez-Lopez*, 126 S. Ct. 2557, 165 L.Ed. 2d 409, 414 (2006), this Court held, in the context of a criminal prosecution, that a criminal defendant has a constitutional right to counsel of his choice, and need not show that substitute counsel was or would be ineffective. The defendant need not show prejudice arising out of the denial of the counsel of his choice; the guarantee of fairness in allowing the defendant the counsel of his choice means that the accused be defended by the counsel of his choice. *Id.* As discussed above, the constitutional

right to counsel of choice is not limited to criminal proceedings, so this Court's holding in *Gonzalez-Lopez* reinforces MIYASHIRO's right here to have the counsel of his choice, ALBERTINI, to represent him at trial.

## B. PLAINTIFF MIYASHIRO HAS A RIGHT TO HAVE ALBERTINI REPRESENT HIM AT TRIAL AND WAS WRONGFULLY DEPRIVED OF THAT RIGHT IN THIS CASE.

As noted above, and in other of the cases cited herein, the right to counsel of choice is not absolute or unfettered. That, however, is a far cry from the decision of the Supreme Court of the State of Hawaii that MIYASHIRO had ***no*** rights at all to his choice of ALBERTINI. Courts have discussed the kind of balancing test that should take place when a court is deciding, in its discretion, whether or not to allow a litigant's choice of counsel to represent him in a criminal or civil case. For example, the court in *In re Bell South Corp.* 334 F.2d 941, 956 (11th Cir. 2003) stated,

> Accordingly, a litigant's freedom to hire the lawyer of his choice can be overridden if a court finds that the choice would interfere with the orderly administration of justice. *Dinitz*, 538 F.2d at 1219; *Panzardi-Alvarez v. United States*, 879 F.2d 975, 980 (1st Cir. 1989).

The court also stated that the right to counsel of choice must yield a court's discretion to disqualify the counsel of choice because of misconduct impeding the orderly conduct of justice. *Id.* at 955. In addition, the choice of counsel may be overridden if the counsel was chosen solely or primarily for the purpose of disqualifying the judge. *Id.* at 956.

If the attorney is guilty of ethical violations, he may also be denied, but must be given a chance to answer the

charges. See, *Schlumberger Technologies, Inc. v. Wiley*, 113 F.3d 1553, 1559 (11th Cir. 1997). The *Schlumberger* court rejected a Fourth Circuit standard for deciding the issue because it gave the discretion to district courts "to deny admission *pro hac vice* to an attorney guilty of 'unlawyer-like conduct' because we found ***the discretion permitted by the Fourth Circuit too broad and, consequently, susceptible to abuse***." *Id.* (Emphasis added.)

In *U.S. v. Locascio*, 6 F.3d 924 (2d Cir. 1993), the court stated, "In deciding a motion for disqualification, the district court recognizes a presumption in favor of the accused's chosen counsel, although this presumption can be overcome by a showing of an actual conflict or potentially serious conflict." It also stated,

> There are many situations in which a district court can determine that disqualification of counsel is necessary. The most typical is where the district court finds a potential or actual conflict in the chosen attorney's representation of the accused, either in a multiple representation situation, [citations omitted], or because of the counsel's prior representation of a witness or co-defendant, [citation omitted]. Courts have also considered disqualification where the chosen counsel is implicated in the allegations against the accused and could become an unsworn witness for the accused, [citations omitted], or where the chosen counsel is somehow unable to serve without unreasonable delay or inconvenience in completing the trial, [citation omitted].

It is, therefore, within a court's discretion to refuse to allow a litigant in a civil trial the right to choose her own counsel, but that discretion is not without limits, including the ones discussed in the cases above regarding acceptable

bases for denying a litigant his right to counsel of choice. A guiding factor for courts in making such a decision was stated in *In re Evans*, 524 F.2d 1004, 1007 (5th Cir. 1975), discussing admission to a district court to appear *pro hac vice*, the court stated,

> Admission to a state bar creates a presumption of good moral character that cannot be overcome merely by the whims of the District Court. An applicant for admission *pro hac vice* who is a member in good standing of a state bar may not be denied the privilege to appear except "on a showing that in any legal matter, whether before the particular district court or in another jurisdiction, he has been guilty of unethical conduct of such a nature as to justify disbarment of a lawyer admitted generally to the bar of the court." *Sanders v. Russell*, 401 F.2d at 247-48.

Even though this decision and others discussed herein concerned federal district court behavior, they still have at their roots the principle that a litigant has the right to counsel of his choice, which right exists in both federal and state courts, as seen from the cases cited above. The cases articulate a principle regarding the limits of a court's discretion to deny a litigant the right to counsel of choice, which should apply to federal and state courts as related to same constitutional rights and that is that a court's exercise of discretion in refusing to allow a litigant counsel of choice is not unfettered discretion and there must be clear and cogent reasons for the denial of this constitutional right.

Applying all this to the case at hand, first of all the Supreme Court of the State of Hawaii was simply in error when it held in its Order Denying Petition for Writ of

Mandamus that there is no right to counsel of choice in federal or state courts (as were ROEHRIG's counsel when they represented to the Hawaii Supreme Court that right to counsel of choice only applies in criminal cases). There is a clear constitutional right of Plaintiff MIYASHIRO to have ALBERTINI, his counsel of choice and in whom he has confidence, represent him in this action, including at trial. That is not to say that MIYASHIRO's right was absolute or automatically mandated granting ALBERTINI *pro hac vice* status. But as a direct result of the failure of the Hawaii Supreme Court to recognize the constitutional right, it failed to understand and appreciate that the trial court's discretion to deny MIYASHIRO the right to counsel of his choice is not absolute, and required consideration and articulation of the factors set forth in the cases cited herein for refusing to allow ALBERTINI the requested status. The Hawaii Supreme Court's review was thus doubly flawed and cannot be allowed to stand, when it upholds a meritless deprivation of MIYASHIRO's constitutional right.

The trial court's order denying *pro hac vice* status to ALBERTINI at issue here was made by the Honorable George A. Masuoka, who basically simply adopted the earlier ruling of the Honorable Ronald Ibarra, prior appointed Judge for this matter, when all other judges in the circuit recused themselves because of their relationships with Defendant ROEHRIG. That order stated as the reasons for denying that status to ALBERTINI:

> He [ALBERTINI] had been an attorney *pro hac vice* four other times in 11 years; he could still be retained as a consultant or paralegal; Gierlach is competent to handle complex trials; and Mr. Miyashiro did not show of the total bar

> population in the State of Hawaii that he could not obtain another lawyer to assist Gierlach in the handling of the case.

Local counsel Gierlach in reality did not have the time, because of a full schedule, to conduct discovery and trial in MIYASHIRO's case. His role was always intended as advisory and as local support for ALBERTINI. All of this was explained to the court and Judge Ibarra and Judge Masuoka.

Soon after making this ruling, when Judge Ibarra was presented with MIYASHIRO's second motion for *pro hac vice* status for ALBERTINI, Judge Ibarra recused himself as well, because of his relationship with Defendant ROEHRIG. Judge Ibarra only ruled on the first motion after the second was made and MIYASHIRO had unsuccessfully tried again to retain local counsel. In any event, his conflict did not prevent ***Judge Ibarra*** from depriving MIYASHIRO of his constitutional right to be represented at trial by the counsel of his choice.

The stated reasons are clearly essentially no reasons at all. Certainly there is stated no basis under the cases cited for denying the requested *pro hac vice* status to allow MIYASHIRO his right to counsel of his choice. Judge Ibarra states that ALBERTINI has been admitted four times before to appear *pro hac vice* in Hawaii, but there is no mention of any misconduct, conflicts of interest, unethical behavior or other problems that make it inadvisable to allow ALBERTINI to appear again here. There is certainly no apparent judicially fixed number of times an out-of-state attorney may appear *pro hac vice* in Hawaii. In fact there is no real basis stated in the ruling why ALBERTINI should not be acceptable as counsel for MIYASHIRO. Judge Ibarra merely speculates that there must be some

other attorney in Hawaii that MIYASHIRO could hire. Actually, when MIYASHIRO renewed the application for admission of ALBERTINI *pro hac vice*, he explained that he had in fact extensively tried to find another attorney he could hire, but was unable to do so. The ubiquitous influence of ROEHRIG made it impossible. In any event, MIYASHIRO's ability to hire another attorney is irrelevant. The issue here is whether the trial court and Supreme Court of Hawaii can deprive MIYASHIRO of his constitutional right to be represented at trial by the attorney of ***his*** choice. The constitutional right to counsel of your choice would be toothless and illusory if the standard for denying it can be that there may be some other attorney the litigant could hire; there would ***always*** be another attorney out there who ***could*** be retained.

There is no indication or findings in the rulings of Judges Ibarra and/or Masuoka that ALBERTINI was found unfit because of prior improper conduct, conflicts of interest, that he was not a member in good standing of the California Bar, was guilty of unethical behavior, that allowing ALBERTINI to appear and serve as trial counsel would cause delays of trial, or that ALBERTINI was advocated solely or primarily to disqualify the judge, or a finding of any of the other factors cited in the cases that discuss when a litigant may be deprived of the right to counsel of his choice. In fact, ALBERTINI was allowed to conduct discovery and complete much of the trial preparation for the case, before being told finally that he would not be allowed to represent MIYASHIRO at trial. Allowing ALBERTINI to act *pro hac vice* could thus only expedite the trial and guarantee that MIYASHIRO would receive the most knowledgeable and competent representation at trial. In addition, the court's allowance of ALBERTINI to

act in trial preparation and discovery created a justifiable expectancy that he would be allowed to conduct the trial. It is unfair of the court to simply deny the right without reason, when his participation had already been allowed.

Quoting the decision in *U.S. v. Ferguson*, 550 F. Supp. 1256 (S.D.N.Y. 1982), the court in *U.S. v. Pepper & Potter, Inc.*, 677 F. Supp. 123, 126 (E.D.N.Y. 1988) stated, "'[a] cardinal principle of our system of justice is that not only must there be the reality of a fair trial and impartiality in accordance with due process, but also the appearance of a fair trial and impartiality.'" The very essence of the due process Amendments to the U.S. Constitution is their guaranties of a fair trial and hearing. That has also been a guiding principle of the cases, etc. that have interpreted these Amendments and explored their application under actual circumstances.

Due process not only requires fairness, but also the appearance of fairness. Fairness and the appearance of fairness are sorely lacking here. The denial of *pro hac vice* status for ALBERTINI was initially made by Judge Ibarra, whose ties to ROEHRIG were such that he felt he had to recuse himself, but not until after he had eliminated, based on the most transparently spurious of justifications, the counsel MIYASHIRO believed in and felt had the skills and knowledge to best represent him at trial. Nowhere did Judge Ibarra attempt any analysis of reasons why ALBERTINI should not be allowed to represent MIYASHIRO or the interests of the court dictated ALBERTINI not be allowed to conduct the trial. Judge Masuoka compounds the problem by simply rubber-stamping Judge Ibarra's reasoning, or lack thereof. The Supreme Court of Hawaii seemed unaware that there is a constitutional right at stake, so did not attempt any review of the required

showing for the lower court decisions denying *pro hac vice* status to MIYASHIRO's counsel of choice.

There is neither fairness nor the appearance of fairness in this, quite the opposite. If friends and acquaintances of ROERHIG can eliminate MIYASHIRO's choice of attorney for trial, MIYASHIRO can have little confidence that he will have a full and fair hearing. There is no cogent or logical reason stated for the denial. The denial thus becomes to MIYASHIRO, and to onlookers, likely merely a capricious attempt to impair MIYASHIRO's ability to prove his case and gain redress for the legal malpractice of ROEHRIG. Moreover, the Supreme Court of Hawaii's denial of the Petition for Writ of Mandamus creates a conflict among the courts of the United States, wherein in some places a litigant has constitutional rights to have counsel of choice represent her/him, while in others this right does not exist and a litigant may be deprived of counsel of his choice unfairly and arbitrarily, with the appearance of collusion by friends of a defendant to protect their friend and colleague. Such disparate treatment cannot possibly be consistent with the principles of due process and fair treatment under the law.

## CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari to the United States Supreme Court should be granted. Cases sometimes refer to the term "home cooking" when, for whatever reason, a litigant finds himself facing greater odds against winning a lawsuit in a certain locale. Presumably, that is one thing against which the procedural protections of the Fifth, Sixth and Fourteenth

Amendments of the U.S. Constitution are aimed at providing protection. Among the procedural safeguards that have been developed is the right to be represented by the counsel of your choice, in both civil and criminal cases. Granted it is not an absolute or automatic right, but for it to be denied there must be logical and cogent reasons. Here, MIYASHIRO has been deprived of this right without the necessary justification. MIYASHIRO looks to this Court to redress the deprivation of his constitutional right herein by the courts of Hawaii. Hopefully this Court will agree that the treatment of MIYASHIRO by the Supreme Court of Hawaii is unconstitutional and unfair, so cannot be allowed to stand.

January 27, 2007

Respectfully submitted,

GEORGE MIYASHIRO, Petitioner,
*in propria persona*

**APPENDIX A**

NO. 28193

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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GEORGE MIYASHIRO, Petitioner,

vs.

THE HONORABLE GEORGE M. MASUOKA, Respondent

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ORIGINAL PROCEEDING

ORDER DENYING PETITION FOR WRIT OF MANDAMUS

(By: Moon, C.J., Levinson, and Nakayama, JJ., and Intermediate Court of Appeals Judge Nakamura, in place of Duffy, J., recused, and Acoba, J., dissenting)

(Filed Nov. 1, 2006)

Upon consideration of the petition for a writ of mandamus filed by petitioner George Miyashiro and the papers in support, it appears that there is no federal or state constitutional right to *pro hac vice* appearance of counsel before any Hawai'i state court. *See Bank of Hawaii v. Kunimoto,* 91 Hawai'i 372, 388, 984 P.2d 1198, 1214 (1999). Granting Eugene Albertini full *pro hac vice* status in Civil No. 04-1-0211 was within the discretion of the circuit judge, *see* RSCSH 1.9, and the refusal to do so for the reasons for which *pro hac vice,* appearance was initially denied was not a flagrant and manifest abuse of discretion. Thus, petitioner is not entitled to a writ of mandamus. *See Kema v. Gaddis,* 91 Hawai'i 200, 204, 982 P.2d 334, 338 (1999) (A writ of mandamus will not issue unless the petitioner demonstrates a clear and indisputable right to relief and a lack of alternative means to redress adequately the alleged wrong or obtain the requested

action. Such a writ is not intended to supersede the legal discretionary authority of the lower court. Where a court has discretion to act, mandamus will not lie to interfere with or control the exercise of that discretion, even when the judge has acted erroneously, unless the judge has exceeded his or her jurisdiction, has committed a flagrant and manifest abuse of discretion, or has refused to act on a subject properly before the court under circumstances in which it has a legal duty to act.). Therefore,

IT IS HEREBY ORDERED that the petition for a writ of mandamus is denied.

DATED: Honolulu, Hawai'i, November 1, 2006.

David J. Gierlach,
for petitioner

/s/ Honorable C.J. Moon

/s/ Honorable Steven Levinson

/s/ Honorable Paula Nakayama

/s/ Honorable Craig H. Nakamura

I dissent and would grant the petition.

/s/ Honorable J. Acoba

**APPENDIX B**

S.C. NO. 28193

IN THE SUPREME COURT OF THE STATE OF HAWAII

| | |
|---|---|
| GEORGE MIYASHIRO,<br>Petitioner,<br>vs.<br>THE HONORABLE GEORGE M. MASUOKA,<br>Respondent. | S.C. NO. 28193<br>PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION |

PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

MEMORANDUM IN SUPPORT OF PETITION

DECLARATION OF EUGENE J. ALBERTINI

DECLARATION OF DAVID J. GIERLACH

EXHIBITS 1 THROUGH 10

CERTIFICATE OF SERVICE

(Filed Oct. 5, 2006)

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S.C. NO. _____

IN THE SUPREME COURT OF THE STATE OF HAWAII

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|---|---|
| GEORGE MIYASHIRO,<br>Petitioner,<br>vs.<br>THE HONORABLE GEORGE M. MASUOKA,<br>Respondent. | S.C. NO. _____<br>PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION |

PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

Petitioner respectfully files this Petition for Writ of Mandamus and or Prohibition pursuant to Rule 21(b) of the *Hawaii Rules of Appellate Procedure*. The Petition is supported by a Memorandum in Support of Petition, the Declaration of David J. Gierlach, Exhibits 1 through 10 and any further matters that may be of record in this case.

DATED: Honolulu, Hawaii, October 5, 2006

/s/ David J. Gierlach
DAVID J. GIERLACH
Attorney for Petitioner

S.C. NO. _____

IN THE SUPREME COURT OF THE STATE OF HAWAII

| | |
|---|---|
| GEORGE MIYASHIRO,<br>Petitioner,<br>vs.<br>THE HONORABLE GEORGE M. MASUOKA,<br>Respondent. | S.C. NO. _____<br>PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION |

MEMORANDUM IN SUPPORT OF PETITION

## I. STATEMENT OF FACTS

The basis for this Petition for Writ of Mandamus is that the Honorable George M. Masuoka has committed a flagrant and manifest abuse of discretion in refusing to permit full *pro hac vice* status to California attorney Eugene J. Albertini. Filing counsel David J. Gierlach only agreed to enter this case as local counsel with the expectation that Mr. Albertini, an attorney in good standing from California, would be permitted *pro hac vice* status. Mr. Miyashiro interviewed scores of Honolulu, Big Island and other attorneys in an effort to find counsel in the State of Hawaii to prosecute his claims against Defendant Stanley H. Roehrig. Mr. Miyashiro's efforts were unsuccessful. Mr. Albertini is the person with the greatest knowledge of this case, he has been granted limited *pro hac vice* status to conduct all of the discovery, including depositions, but has been barred from participating at the trial of this case. It is that bar that motivates this Petition for Writ of Mandamus.

A. Background

The First Amended Complaint, attached hereto as Exhibit 1, sets forth in detailed fashion the malpractice allegations against Defendant Stanley H. Roehrig. Prior to filing the instant Complaint, Mr. Albertini engaged in substantial investigation including review of over twenty (20) boxes of documents, interviewing witnesses and engaging in other due diligence to determine whether a case in good faith existed. Declaration of Eugene J. Albertini attached.

After the case was filed, each of the Third Circuit Court judges recused themselves from hearing this case. *See* Exhibit 2. The recusals included the Honorable Ronald Ibarra. However, Judge Ibarra did not recuse himself until after he decided to hear and then deny the motion to allow Eugene J. Albertini to appear as counsel *pro hac vice. See* Transcript of Proceedings of October 11, 2004 attached as Exhibit 3. Judge Ibarra cited the following reasons to deny Mr. Albertini *pro hac vice* status:

> He had been an attorney *pro hac vice* four other times in 11 years; he could still be retained as a consultant or paralegal; Gierlach is competent to handle complex trials; and Mr. Miyashiro did not show of the total bar population in the State of Hawaii that he could not obtain another lawyer to assist Gierlach in the handling of the case.

*Id.* at 39.[1]

[1] The Verified Application of Albertini to appear as counsel *pro hac vice* is attached hereto as Exhibit 4.

In light of Judge Ibarra's comment that Miyashiro had not exhausted his efforts to find local counsel to try the case, Mr. Miyashiro then undertook an exhaustive effort to contact counsel throughout the State of Hawaii seeking representation in this case. He then filed, on November 22, 2004, a second motion to allow Albertini to appear as *pro hac vice*. *See* Exhibit 5 attached hereto. Therein, Mr. Miyashiro delineated his exhaustive efforts to find local counsel to try this case. *Id.* Those efforts were unsuccessful. On December 8, 2004, Judge Ibarra recused himself from this case. Exhibit 6.

On December 14, 2004, this Honorable Court assigned the Honorable George M. Masuoka as the Presiding Judge in this case. *See* Exhibit 7 attached hereto. The motion to permit Albertini to appear *pro hac vice* came on for hearing before Judge Masuoka on April 6, 2005. *See* Exhibit 8.

Because of the importance of Albertini of being able to play a significant role in the trial of this case, Mr. Miyashiro went to the remarkable extent of agreeing with the Defendants to dismiss Co-Defendants Judge Glenn Hara and the Roehrig law firm as Defendants in exchange for Defendants withdrawing their objection to Albertini's *pro hac vice* status. During off the record discussions, Judge Masuoka said he would not agree to allow Albertini full status at that time. The parties and the Judge then agreed that Mr. Albertini would be permitted to participate in all non-court matters and the issue of his participation at the trial was to be reserved for further determination. *Id.* at 3:17-22.

In early May 2006, Plaintiff again raised the issue informally with Judge Masuoka at hearings on motions as to whether he would be inclined to grant Mr. Albertini full

status as *pro hac vice.* Judge Masuoka declined. Declaration of David J. Gierlach.

Subsequently, because the United States Supreme Court decided the case of *United States v. Gonzalez,* 126 S.Ct. 2557 (2006), wherein the high court determined, pursuant to the Sixth Amendment, that a criminal defendant had a constitutional right to the counsel of his choice, whether or not that counsel was licensed to practice in a particular state. Based on that and also based on the Fifth and Eleventh Circuits which have held that a Fifth Amendment right exists with respect to counsel of choice for civil cases, Plaintiff renewed his request for admission of Albertini full status *pro hac vice. See* Exhibit 9 attached. That motion came on for hearing on September 19, 2006. *Id.* It was denied by Judge Masuoka. Judge Masuoka gave two reasons for the denial. First, he said he had the discretion to deny it and second, he tended to agree with Judge Ibarra's reasoning in the original denial. *See supra. See* Transcript of Proceedings for September 19, 2006 which shall be filed as an errata upon its receipt.

Of some importance is that for much of 2005 and between February 2006 and early May 2006, discovery was stayed at the insistence of the Defendant. Declaration of David J. Gierlach. Discovery was only permitted to resume in May 2006 and has only actually resumed effective July 2006. In short, approximately four months have been permitted to prepare this case for trial. If Mr. Albertini were permitted to try this case, Plaintiff would be well and competently represented because he is the holder of the necessary information about this case. Depositions are going forward at full bore. Mr. Albertini has attended these depositions, he has taken all of the depositions on behalf of Plaintiff. Albertini is the attorney

that Plaintiff has chosen to represent him in this case. Accordingly, barring him from participating in the trial is highly prejudicial and the reasons given for such a bar have demonstrated a manifest abuse of discretion by the trial court.

## II. STATEMENT OF ISSUES PRESENTED AND RELIEF SOUGHT

1. Whether the trial court has committed a flagrant and manifest abuse of discretion in refusing to permit California attorney in good standing Eugene J. Albertini to participate in the trial of this matter when Plaintiff has chosen Mr. Albertini as his counsel of choice, Albertini is most knowledgeable about Plaintiff's claims, and Albertini is most prepared to try this case?

2. Whether the trial in this case should be stayed pending a determination by this Court of the pending writ?

Mr. Miyashiro respectfully requests this Court to direct Judge Masuoka to permit Eugene J. Albertini to participate as trial counsel (with Gierlach participating also as local counsel) in the trial of this case. In addition, it is respectfully requested that this Court stay the pending trial until a determination of this matter is made.

## IV. [sic] STATEMENT OF REASONS FOR ISSUING THE WRIT

### A. A Writ Of Mandamus Is Appropriate Under The Instant Circumstances

A writ of mandamus is extraordinary remedy that will not issue unless the petitioner demonstrates:

> (1) a clear and indisputable right to relief; and (2) a lack of other means adequately to address the alleged wrong or obtain the requested action. *Tanaka v. Nagata*, 76 Hawaii 32, 35, 868 P.2d 450, 453 (1994).
>
> * * *
>
> Where a trial court has discretion to act, mandamus clearly will not lie to interfere with or control the exercise of that discretion, even when the judge has acted erroneously, unless the judge has exceeded his or her jurisdiction, has committed a flagrant and manifest abuse of discretion, or has refused to act on a subject properly before the court under circumstances in which it is subject to a legal duty to act. *State ex. rel. Marsland v. Ames,* 71 Haw. 304, 307, 788 P.2d 1281, 1283 (1990).

*Straub Clinic & Hospital v. Kochi,* 81 Hawaii 410, 417, 917 P.2d 1284, 1291 (1996).

As set out below, Mr. Miyashiro has a constitutional right, grounded in the Fifth Amendment of the *United States Constitution,* to counsel of his choice in a civil case. The denial of that right is causing immediate, irreparable and unreviewable harm to Mr. Miyashiro. He is denied his counsel of choice in the face of only specious reasoning. The matter is effectively unreviewable on appeal because it is impossible to demonstrate how the outcome would have changed if Albertini participated.

B. Mr. Miyashiro Has A Constitutional Right To Counsel Of His Choice Absent Extraordinary Circumstances

According to *McCuin v. Texas Power & Light Co.,* 714 F.2d 1255, 1262 and n. 24 (5th Cir. 1983), "the right to counsel in criminal cases is expressly guaranteed by the Sixth Amendment; the right to counsel in civil cases is no less fundamental and springs from both statutory authority [*i.e.*, 28 U.S.C. § 1654 n.20] and from the constitutional right to due process of law." "It is true that there is a 'fundamental right to counsel,' in civil cases, that right springs generally from the protections of the due process clause. *See generally, Robinson v. Boeing Co.,* 79 F.3d 1053 (11th Cir. 1996)." *Glover v. Standard Federal Bank,* 2001 U.S. Dist. LEXIS 6658 (March 6, 2001), *rev'd on other grounds, Glover v. Standard Federal Bank,* 283 F.3d 953 (8th Cir. 2002).

The United States Supreme Court, in *United States v. Gonzalez-Lopez,* 126 S.Ct. 2557 (2006), found a constitutional right to counsel of one's choice in criminal cases pursuant to the Sixth Amendment. While counsel for Petitioner recognizes that this is not a criminal case, the policy factors which supported a ringing endorsement of counsel of one's choice in *Gonzalez* apply equally well to the facts of this case.

Here is how the Court reasoned:

> We have little trouble concluding that erroneous deprivation of the right to counsel of choice, "with consequences that are necessarily unquantifiable and indeterminent, unquestionably qualifies as 'structural error.'" [Citation omitted]. Different attorneys will pursue different strategies with

> regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument.
>
> * * *
>
> In light of these myriad aspects of representation, the erroneous denial of counsel bears directly on the "framework within which the trial proceeds," [citation omitted] – or indeed on whether it proceeds at all. It is impossible to know what different choices the rejected counsel would have made, and then quantify the impact of those different choices on the outcome of the proceedings. Many counsel decisions, . . . do not even concern the conduct of trial at all."

*Id.* at 2564-2565.

Rule 1.9 of the *Rules of the Hawaii Supreme Court* appear to support this broad interpretation of *pro hac vice* status for attorneys in Hawaii. "Any attorney actively licensed to practice law by the highest court of a state or territory of the United States or the District of Columbia who is not a resident of Hawaii may be permitted to associate himself or herself with a member or members of the Hawaii bar in the presentation of a specific case at the discretion of the presiding judge or judges." It is axiomatic that a trial court may not arbitrarily deny *pro hac vice* status. *Fuller v. Diesslin,* 868 F.2d 604 (3rd Cir. 1989), *cert. denied,* 110 S.Ct. 203.

In this case, Mr. Miyashiro made great efforts to obtain competent local counsel with the resources and willingness to take on the malpractice case against Mr. Roehrig. He was unable to do so. After Judge Ibarra's ruling regarding Albertini's *pro hac vice* status, Mr. Miyashiro again made

efforts to contact attorneys throughout the State of Hawaii. He again was unable to do so. Neither Judge Ibarra nor Judge Masuoka have given reasonable explanations as to why *pro hac vice* status for trial has been denied.

Accordingly, it is respectfully requested that this Honorable Court grant the Petition for Writ of Mandamus. It is also respectfully requested that this Court enter a stay of the pending trial until this matter is resolved.

DATED: Honolulu, Hawaii, October 5, 2006.

/s/ David J. Gierlach
DAVID J. GIERLACH
Attorney for Petitioner

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S.C. NO. _____

IN THE SUPREME COURT OF THE STATE OF HAWAII

| | |
|---|---|
| GEORGE MIYASHIRO,<br>Petitioner,<br>vs.<br>THE HONORABLE GEORGE M. MASUOKA,<br>Respondent. | S.C. NO. _____<br>DECLARATION OF EUGENE J. ALBERTINI |

DECLARATION OF
EUGENE J. ALBERTINI

EUGENE J. ALBERTINI declares as follows:

1. I am an attorney in good standing licensed to practice law before all courts in the State of California and have personal knowledge of the facts set forth herein.

2. The First Amended Complaint sets forth in detailed fashion the malpractice allegations against Defendant Stanley H. Roehrig. Prior to preparing to and filing the instant Complaint, I engaged in substantial investigation including over twenty (20) boxes of documents, interviewing witnesses and other due diligence to determine whether a case in good faith existed.

I declare under penalty of law that the foregoing is true and correct to the best of my knowledge and belief.

DATED: La Quinta, California October 2, 2006.

/s/ E.J. Albertini
EUGENE J. ALBERTINI

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S.C. NO. _____

IN THE SUPREME COURT OF THE STATE OF HAWAII

| | |
|---|---|
| GEORGE MIYASHIRO,<br>Petitioner,<br>vs.<br>THE HONORABLE GEORGE M. MASUOKA,<br>Respondent. | S.C. NO. _____<br>DECLARATION OF DAVID J. GIERLACH |

DECLARATION OF
DAVID J. GIERLACH

DAVID J. GIERLACH declares as follows:

1. I am an attorney licensed to practice law before all courts in the State of Hawaii and am the attorney of record for Plaintiff herein.

2. In early May 2006, counsel for Plaintiff again raised the issue informally with Judge Masuoka at hearings on motions as to whether he would be inclined to grant Mr. Albertini full status as *pro hac vice.* Judge Masuoka declined.

3. Of some importance is that between February 2006 and early May 2006, discovery in this case was stayed at the insistence of the Defendant.

4. Attached hereto as Exhibit 1 is a true and correct copy of the First Amended Complaint filed in this case on August 4, 2004.

5. Attached hereto as Exhibit 2 are true and correct copies of Certificates of Disqualification from the Circuit Court judges on the island of Hawaii.

6. Attached hereto as Exhibit 3 is a true and correct copy of the Verified Application of Eugene J. Albertini To Appear As Counsel *Pro Hac Vice.*

7. Attached hereto as Exhibit 4 is a true and correct copy of the Transcript of Proceedings before the Honorable Ronald Ibarra, dated October 11, 2004.

8. Attached hereto as Exhibit 5 is a true and correct copy of Plaintiff George Miyashiro's Motion to Allow Eugene J. Albertini to Appear as Counsel *Pro Hac Vice* with its attachments.

9. Attached hereto as Exhibit 6 is a true and correct copy of the Disqualification Notice filed by Judge Ibarra on December 8, 2004.

10. Attached hereto as Exhibit 7 is a true and correct copy of the Assignment of Circuit Court Judge filed December 14, 2004.

11. Attached hereto as Exhibit 8 is a true and correct copy of a Notice of Hearing Re: Plaintiff George Miyashiro's Motion to Allow Eugene J. Albertini to Appear as Counsel *Pro Hac Vice,* filed November 22, 2005.

12. Attached hereto as Exhibit 9 is a true and correct copy of the Transcript of Proceedings before the Honorable George Masuoka dated April 6, 2005.

13. Attached hereto as Exhibit 10 is a true and correct copy of Plaintiff George Miyashiro's Renewed Motion to Allow Eugene J. Albertini to Appear as Counsel *Pro Hac Vice* With Full Status, filed August 28, 2006.

I declare under penalty of law that the foregoing is true and correct to the best of my knowledge and belief.

DATED: Honolulu, Hawaii, October 5, 2006.

/s/ David J. Gierlach
DAVID J. GIERLACH

[Exhibits Omitted In Printing]

(2)

No. 06-1072

Supreme Court, U.S.
FILED
MAR 0 1 2007
OFFICE OF THE CLERK

In The
# Supreme Court of the United States

GEORGE MIYASHIRO,

*Petitioner,*

vs.

Honorable GEORGE M. MASUOKA, Judge in the trial court, and the SUPREME COURT OF THE STATE OF HAWAII,

*Respondents.*

**On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Hawaii**

## BRIEF OF RESPONDENT STANLEY H. ROEHRIG IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

A. IN VIEW OF THE TRIAL COURT'S DISMISSAL OF THE UNDERLYING MALPRACTICE ACTION BECAUSE OF PETITIONER'S EMBEZZLEMENT AND BREACH OF FIDUCIARY DUTY, SHOULD THIS COURT LIKEWISE DECLINE TO ASSIST PETITIONER, WHO WOULD USE THE JUDICIAL PROCESS TO BENEFIT FROM HIS OWN FRAUDULENT CONDUCT?

B. DOES PETITIONER HAVE A CONSTITUTIONAL RIGHT TO CHOOSE OUT-OF-STATE COUNSEL AS LEAD TRIAL COUNSEL, DESPITE COUNSEL'S DISQUALIFICATION BY A CALIFORNIA COURT, MULTIPLE *PRO HAC VICE* APPEARANCES, UNAUTHORIZED PRACTICE OF LAW, DISCOVERY MISCONDUCT, AND STIPULATION BY PETITIONER THAT HIS *PRO HAC VICE* LAWYER BE LIMITED TO A SUPPORTING ROLE?

C. IS THE HAWAII SUPREME COURT'S ORDER DENYING MANDAMUS A FINAL JUDGMENT FOR PURPOSES OF 28 U.S.C. § 1257(A), WHEN JUDGMENT HAS BEEN ENTERED IN THE UNDERLYING MALPRACTICE ACTION, PETITIONER HAS APPEALED, AND THE SAME QUESTION REGARDING *PRO HAC VICE* COUNSEL HAS BEEN LISTED IN HIS POINTS ON APPEAL?

## LIST OF PARTIES TO THE PROCEEDING

Petitioner GEORGE MIYASHIRO ("Miyashiro") is the plaintiff-appellant in *Miyashiro v. Roehrig, Roehrig, Wilson and Hara*, Civil No. 04-1-0211, a legal malpractice action filed on July 19, 2004, against defendant-appellee and respondent STANLEY H. ROEHRIG ("Roehrig") in Hawaii's Third Circuit Court, and currently on appeal in the Hawaii Intermediate Court of Appeals, No. 28395. This State court appeal by Miyashiro follows the entry of a judgment on all claims in favor of Roehrig by Respondent GEORGE M. MASUOKA, Hawaii Circuit Court Judge, after the court granted four motions for summary judgment. Miyashiro filed a statement of points on appeal in that proceeding which includes the *pro hac vice* ruling challenged herein. Miyashiro has also named Respondent HAWAII SUPREME COURT, based on its November 1, 2006, order denying Miyashiro's petition for writ of mandamus asking that court to vacate Judge Masuoka's *pro hac vice* order in *Miyashiro*.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED FOR REVIEW | i |
| LIST OF PARTIES TO THE PROCEEDING | ii |
| TABLE OF CONTENTS | iii |
| TABLE OF AUTHORITIES | vii |
| BRIEF OF RESPONDENT STANLEY H. ROEHRIG IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI | 1 |
| STATEMENT OF THE CASE | 2 |
| A. Introduction | 2 |
| B. Background | 3 |
| 1. THE UNDERLYING CASES | 3 |
| a. The *Jack's Tours* Litigation | 3 |
| b. The *Roehrig* Malpractice Case | 5 |
| 2. THE *PRO HAC VICE* MOTIONS | 7 |
| a. The First Motion | 7 |
| b. The Second Motion | 13 |
| c. The Third Motion | 14 |
| 3. THE PETITION FOR WRIT OF MANDAMUS | 16 |
| 4. THE STATE COURT APPEAL | 17 |
| ARGUMENT | 18 |

TABLE OF CONTENTS – Continued

Page

A. IN VIEW OF THE TRIAL COURT'S DISMISSAL OF THIS MALPRACTICE ACTION, BASED ON PETITIONER'S ACKNOWLEDGED EMBEZZLEMENT AND BREACH OF FIDUCIARY DUTY, THIS COURT SHOULD ALSO REFUSE TO ASSIST HIM IN HIS ATTEMPTS TO USE JUDICIAL PROCESS TO BENEFIT FROM HIS OWN FRAUDULENT CONDUCT ..... 18

B. PETITIONER DOES NOT HAVE A CONSTITUTIONAL RIGHT TO CHOOSE OUT-OF-STATE LEAD TRIAL COUNSEL IN A CIVIL CASE, ESPECIALLY IN LIGHT OF COUNSEL'S DISQUALIFICATION BY A CALIFORNIA COURT, MULTIPLE *PRO HAC VICE* APPEARANCES, UNAUTHORIZED PRACTICE OF LAW, DISCOVERY MISCONDUCT, AND A STIPULATION BY PETITIONER THAT HIS *PRO HAC VICE* LAWYER BE LIMITED TO A SUPPORTING ROLE ..... 20

C. PETITIONER FAILS TO INFORM THIS COURT THAT JUDGMENT HAS BEEN ENTERED AGAINST HIM IN THIS MALPRACTICE CASE, PETITIONER HAS APPEALED TO THE HAWAII APPELLATE COURTS, AND HE HAS LISTED THIS *PRO HAC VICE* RULING IN HIS POINTS ON APPEAL ..... 25

CONCLUSION ..... 28

TABLE OF CONTENTS – Continued

Page

APPENDICES:

A. ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BASED ON PLAINTIFF'S ADMITTED EMBEZZLEMENT AND BREACH OF FIDUCIARY DUTY (FILED SEPT. 11. 2006)..... App. A-1

B. ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON HAWAI'I RULES OF PROFESSIONAL CONDUCT (FILED SEPT. 11. 2006) ..... App. B-1

C. OPINION IN *CHRONOMETRICS V. SYSGEN, SCHAEFER AND FATT*, 110 CAL.APP.3D 597, 168 CAL.RPTR. 196 (1980) ..... App. C-1

D. AMENDED FINAL JUDGMENT (FILED JAN. 11, 2007) ..... App. D-1

E. ORDER DENYING WITHOUT PREJUDICE PLAINTIFF'S MOTION TO ALLOW EUGENE J. ALBERTINI TO APPEAR AS COUNSEL *PRO HAC VICE* FILED SEPTEMBER 16, 2004 ..... App. E-1

F. ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO ALLOW EUGENE J. ALBERTINI TO APPEAR AS COUNSEL *PRO HAC VICE* (FILED SEP. 1, 2005)..... App. F-1

G. ORDER DENYING PLAINTIFF GEORGE MIYASHIRO'S *RENEWED* MOTION TO ALLOW EUGENE J. ALBERTINI TO APPEAR AS COUNSEL *PRO HAC VICE* WITH FULL STATUS FILED AUGUST 28, 2006 ..... App. G-1

TABLE OF CONTENTS – Continued

Page

H. NOTICE OF APPEAL OF AMENDED FINAL JUDGMENT FILED JANUARY 11, 2007; EXHIBIT 1; CERTIFICATE OF SERVICE ....App. H-1

I. PLAINTIFF-APPELLANT'S STATEMENT OF POINTS ON APPEAL; CERTIFICATE OF SERVICE ..... App. I-1

# TABLE OF AUTHORITIES

Page

CASES

*Arena Football League v. Roemer*, 9 F.Supp.2d 889 (D.Ill. 1998) ..... 19

*Bank of Hawaii v. Kunimoto*, 91 Hawai'i 168, 45 P.3d 368 (2002) ..... 12

*Bateman Eichler, Hill Richards v. Berne*, 472 U.S. 299 (1985) ..... 18

*Bondi v. Thornton International*, 421 F.Supp.2d 703 (S.D.N.Y. 2006) ..... 2, 18

*Carpenter v. Gomez*, 516 U.S. 981 (1995) ..... 28

*Choquette v. Isacoff*, 836 N.E.2d 329 (Mass.App. 2005) ..... 19

*Chronometrics v. Sysgen, Schaefer and Fatt*, 110 Cal.App.3d 597, 168 Cal.Rptr. 196 (1980) .... 3, 9, 10, 11, 24

*Cox Broadcasting Corporation v. Cohen*, 420 U.S. 469 (1975) ..... 26

*Evans v. Cameron*, 360 N.W.2d 25 (Wis. 1985) ..... 19

*Firestone Tire and Rubber v. Risjord*, 449 U.S. 368 (1981) ..... 27

*Flynt v. Ohio*, 451 U.S. 619 (1981) ..... 25, 28

*Goldstein v. Lustig*, 507 N.E.2d 164 (Ill.App. 1987) ..... 6, 19

*Higgins v. McCrea*, 116 U.S. 671 (1886) ..... 19

*Johnson v. California*, 541 U.S. 428 (2004) ..... 25

*Kaiser Steel v. Mullins*, 455 U.S. 72 (1982) ..... 18

*Kema v. Gaddis*, 982 P.2d 334 (Hawaii 1999) ..... 27

TABLE OF AUTHORITIES – Continued

Page

*Kentucky West Virginia Gas Company v. Pennsylvania Public Utility Commission*, 837 F.2d 600 (3d Cir.), *cert. denied*, 488 U.S. 941 (1988) ..... 21, 23

*Knauer v. Jonathon Roberts Fin. Group*, 348 F.3d 230 (7th Cir. 2003) ..... 19

*Leis v. Flynt*, 439 U.S. 438 (1979) ..... 20, 21, 22

*McMullen v. Hoffman*, 174 U.S. 639 (1899) ..... 18

*Meschi v. Iverson*, 805 N.E.2d 72 (Mass.App. 2004) .... 23, 24

*Mettes v. Quinn*, 411 N.E.2d 549 (Ill.App. 1980) ..... 19

*Miyashiro v. Matsuoka*, Hawaii Supreme Court No. 28193 ..... 1

*Miyashiro v. Roehrig*, Third Circuit, State of Hawaii, Civil No. 04-1-0211 ..... 1, 7, 17

*Nisselson v. Lernout*, 469 F.3d 143 (1st Cir. 2006) ..... 19

*North Dakota State Board of Pharmacy v. Snyder's Drug Stores*, 414 U.S. 156 (1973) ..... 26

*Obert v. Republic Western Insurance Company*, 190 F.Supp.2d 279 (D.R.I. 2002) ..... 21, 22, 23, 24

*Pantely v. Garris, Garris & Garris*, 447 N.W.2d 864 (Mich.App. 1989) ..... 19

*Potashnick v. Port City Construction Company*, 609 F.2d 1101 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980) ..... 22

*Radio Station WOW v. Johnson*, 326 U.S. 120 (1945) ..... 26

*Robins v. Lasky*, 462 N.E.2d 774 (Ill.App. 1984) ..... 20

*United States v. Collins*, 920 F.2d 619 (10th Cir. 1990) ..... 22

TABLE OF AUTHORITIES – Continued

Page

*United States v. Cuauhtemoc Gonzalez-Lopez*, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006) .....21, 22

*United States v. McDonald*, 435 U.S. 850 (1978) ..... 27

UNITED STATES CONSTITUTION

5th Amendment of the U.S. Constitution.....16, 22

6th Amendment of the U.S. Constitution..... 22

14th Amendment of the U.S. Constitution..... 22

STATUTES

United States Code

28 U.S.C. §1257(a) .....*passim*

COURT RULES

Hawai'i Rules of Professional Conduct..... 2, 6

Rules of the Supreme Court of the State of Hawai'i, Rule 1.9.....12, 17

## BRIEF OF RESPONDENT STANLEY H. ROEHRIG IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This is a Brief in Opposition filed by Respondent STANLEY H. ROEHRIG ("Roehrig") to a Petition for Writ of Certiorari filed by Petitioner GEORGE MIYASHIRO ("Miyashiro"), which challenges a November 1, 2006, order filed by Respondent HAWAII SUPREME COURT. *See* Petition, Appendix A. This State order denied Miyashiro's petition for writ of mandamus in *Miyashiro v. Masuoka*, S. C. No. 28193, which in turn, affirmed an order by Respondent GEORGE H. MASUOKA, Hawaii Circuit Court Judge ("Judge Masuoka"), denying a motion by Miyashiro to have California lawyer Eugene J. Albertini appear *pro hac vice* as his lead trial counsel in *Miyashiro v. Roehrig*, Civil No. 04-1-0211, a legal malpractice action now on appeal in the Hawaii Intermediate Court of Appeals.

Roehrig contends this Court: 1) should decline to render aid to one who would use the judicial process to benefit from his own fraudulent conduct, 2) lacks jurisdiction under 28 U.S.C. § 1257(a) because the *pro hac vice* ruling challenged in this Petition has been appealed and the Hawaii Supreme Court has not issued a final ruling, and 3) has never identified a federal constitutional right to choose out-of-state lead trial counsel in a civil case.

## STATEMENT OF THE CASE

### A. Introduction

This Petition for Writ of Certiorari is the latest in a series of legal maneuvers by Petitioner Miyashiro, the former president and CEO of a Hawaii transportation and tour company called Jack's Tours, to recover additional financial benefits after being expelled from that company due to embezzlement and breach of fiduciary duty, by suing his former attorneys. This Petition makes no mention of Miyashiro's acknowledged fraudulent and illegal conduct, however, or the dismissal of his malpractice claims by Respondent Judge Masuoka based "on Plaintiff's admitted embezzlement and breach of fiduciary duty." *See* Appendix A at 2. This Court, like the Hawaii Judiciary, should likewise decline to "aid a tortfeasor who invokes the court's jurisdiction to relieve him of the consequences of fraud." *Bondi v. Thornton International*, 421 F.Supp.2d 703, 713 (S.D.N.Y. 2006).

Moreover, while Miyashiro repeats spurious allegations about "multiple violations of the Rules of Professional Conduct in Hawaii" by Respondent Roehrig, he makes no mention of Judge Masuoka's additional and alternative ruling granting summary judgment on all claims after finding, as a matter of law, that Miyashiro offered no evidence whatsoever that his former lawyer violated any of the *Hawai'i Rules of Professional Conduct*. *See* Appendix B. He likewise fails to inform this Court that he filed identical charges with the Hawaii Supreme Court's Office of Disciplinary Counsel, and that after a thorough review, that watchdog agency also found no substance whatsoever to Miyashiro's claims.

Moreover, Miyashiro claims Eugene J. Albertini "is an experienced attorney of good standing," and that "there [was] no mention of any misconduct, conflicts of interest, unethical behavior or other problems that [made] it inadvisable" to grant Albertini *pro hac vice* status. Petition at 14. In fact, Roehrig presented substantial evidence to trial judges Ronald Ibarra and George Masuoka regarding Albertini's unauthorized practice of law in Hawaii, his substantial discovery misconduct after his appointment, and his undisclosed disqualification as counsel by the California Court of Appeals because of serious violations of that State's Code of Responsibility. *See Chronometrics v. Sysgen, Schaefer and Fatt*, 110 Cal.App.3d 597, 168 Cal.Rptr. 196 (1980). *See* Appendix C.

Finally, while Miyashiro contends this Court has jurisdiction under 28 U.S.C. § 1257(a) to review the Hawaii Supreme Court's order denying mandamus challenging the trial court's *pro hac vice* rulings, he fails to inform this Court that after that order was filed, Judge Masuoka granted summary judgment in the underlying legal malpractice case, judgment was entered for Roehrig on all claims, Miyashiro appealed. That appeal is still pending. He has listed this same *pro hac vice* ruling in his statement of points on appeal.

## B. Background.

### 1. THE UNDERLYING CASES.

#### a. The *Jack's Tours* Litigation

On September 15, 1997, Miyashiro hired Roehrig and his former law partner, now Hawaii Third Circuit Judge Glenn S. Hara ("Judge Hara"), to defend him against a lawsuit filed by his brother Raymond Miyashiro ("Raymond"),

which claimed fraudulent and illegal conduct by Miyashiro in the operation of their family's Big Island transportation and tour company, Jack's Tours. Raymond claimed that Miyashiro, as the controlling stockholder and CEO, had embezzled company funds.

After Roehrig and Judge Hara were retained, Miyashiro told them he and Jack's Tours comptroller Donald Bowers were participating in an illegal scheme at local banks. This scheme involved millions of dollars and the forgery of Miyashiro's former wife's name on loan applications. Concerned, Roehrig researched the issue and determined that his client was likely engaged in an ongoing federal felony. Regardless, Roehrig and Judge Hara agreed to represent Miyashiro against Raymond on condition that he "go straight" and advise them of any questionable conduct in the future. Raymond's case was settled in 1998 when he sold his shares in Jack's Tours, without any public disclosure of bank fraud and embezzlement.

On January 2, 1999, after a dispute with his former wife and son Jeffrey Miyashiro ("Jeffrey"), Miyashiro surrendered Jack's Tours to them. When they entered the premises and spoke with comptroller Donald Bowers, he told them Miyashiro had been stealing money from the company for years. Jeffrey and his mother sued Miyashiro, asserting embezzlement and fraud, and asking that he be removed from control. On April 21, 1999, after a two-day evidentiary hearing describing Miyashiro's improper conduct, Third Circuit Court Judge Greg K. Nakamura removed him from control of Jack's Tours. Jeffrey testified as follows:

> [Comptroller] Bowers informed me that sometime back in 1990 or 1991, he was instructed by George to find ways to take as much money out

> of the company as possible for his benefit and that although Mr. Bowers had pleaded with George to do things legally, . . . George simply didn't care. . . . In that same conversation, Mr. Bowers also informed me of . . . George Miyashiro's disregard of the law in running the company[.]

4/21/99 Tr. at 166. Accountant Taryn Schuman also testified, submitting a lengthy report prepared by her and Jeffrey showing Miyashiro's embezzlement of over $1.3 million from Jack's Tours from 1994 to 1998. Id. at 122-146. After he was removed from control, Miyashiro quietly settled the dispute with his family and surrendered his stock to his former wife. Again, he avoided public exposure or criminal charges by settling with his family before the misconduct was aired.

### b. The *Roehrig* Malpractice Case

On January 2, 2003, Hawaii lawyer David Gierlach filed the first of two complaints on behalf of Miyashiro against Roehrig and his law firm, Roehrig, Roehrig, Wilson and Hara, claiming malpractice because of their alleged collusion with other family members to remove him from control of Jack's Tours and deprive him of its lucrative benefits. That lawsuit was dismissed for lack of prosecution.

On July 19, 2004, Gierlach filed a second lawsuit for Miyashiro, again charging Roehrig and his firm with malpractice, but adding Judge Hara as an additional defendant. Roehrig and his firm commenced discovery, and soon learned that the scope of their former client's illegal conduct at Jack's Tours was more extensive than he disclosed during their representation. Unknown to his

lawyers, between 1994 and 1998 Miyashiro engaged in a widespread scheme involving fraud, falsification of company books, cash kickbacks, embezzlement of company funds, and a complex illegal bar code scam involving various vendors.

When Roehrig discovered the extent of Miyashiro's misconduct while CEO at Jack's Tours, he filed a motion for summary judgment alleging unclean hands, asserting the well-known principle that courts should not be used by fraudfeasors to benefit them from their illegal misconduct. "The basis of the Plaintiff's action in the present case," noted one court in a similar lawsuit, "is an attempt to reduce the economic consequences of his fraudulent conduct by recovering from his attorney." *Goldstein v. Lustig*, 507 N.E.2d 164, 170 (Ill.App. 1987). "The trial court did not err in dismissing the complaint with prejudice." Id. On September 11, 2006, Roehrig filed this and three other motions for summary judgment, two months before the scheduled trial date. *See* Appendix A. In addition to asserting unclean hands, Roehrig also sought summary judgment based on the *Hawai'i Rules of Professional Conduct*, conspiracy and corporate by-laws. In his December 21, 2006, oral ruling based on Miyashiro's acknowledged embezzlement and breach of fiduciary duties, Judge Masuoka declared:

> The court will grant Defendant's motion as to the embezzlement and breach of fiduciary duties. The court has read the reports of the experts, even the Plaintiff's expert, Mr. Ueno, who signed a report with Ms. Schuman indicating that there was embezzlement. Also, the other economic experts, Milks, Mr. Yokoyama and there was one other, I believe, also agree with them. Under these circumstances, the court finds that there

> are no questions of fact and that there was embezzlement.

12/21/06 Tr. at 4.

Again, the instant Petition for Writ of Certiorari conceals Miyashiro's acknowledged embezzlement and breach of fiduciary duties. Indeed, it ignores all four rulings for summary judgment and a final judgment entered in favor of Roehrig. *See* Appendix D. This Petition paints a false picture that trial is imminent and Miyashiro is deprived of out-of-state *pro hac vice* lead trial counsel of his choice. There is no trial pending, only an appeal.

In fact, Miyashiro has been represented by Hawaii counsel David Gierlach as lead trial counsel since 2003, and by *pro hac vice* assistant counsel Albertini since 2002. When Roehrig filed four motions for summary judgment on September 11, 2006, Albertini drafted the opposition memoranda, Gierlach argued for Miyashiro, and Judge Masuoka granted them in Roehrig's favor.

## 2. THE *PRO HAC VICE* MOTIONS

### a. The First Motion.

On September 16, 2004, 18 months after the first malpractice lawsuit was filed, and two months after the second, Gierlach filed a motion on behalf of Miyashiro asking the Third Circuit Court to permit 74-year-old California attorney Eugene Albertini to assist him as *pro hac vice* counsel in *Miyashiro v. Roehrig*. He did not request Albertini's appointment as lead counsel, but rather sought the court's approval of his continued assistance of Miyashiro and Hawaii lawyer Gierlach, which had apparently been going on without court approval since 2002.

The motion was heard by Third Circuit Judge Ronald Ibarra, Administrative Judge of Hawaii's Third Circuit Court, which includes Judges Ibarra, Nakamura, and Hara. Judges Nakamura and Hara sit in Hilo, and Judge Ibarra sits in Kona, on the other side of the Big Island. Judge Hara could not hear this case for obvious reasons. Judge Nakamura recused himself without comment, presumably because his brother Hilo judge was a party in the case. After Judge Ibarra ruled on the first *pro hac vice* motion, he also recused himself, without comment, no doubt for the same reasons as Judge Nakamura. According to Miyashiro, the recusal of these judges "is testament to the pervasive contacts of Roehrig." Petition at 4. There is no evidence to support this specious claim, since Roehrig has appeared countless times before Judges Nakamura and Ibarra since their appointment to the Big Island bench.

On October 11, 2004, the parties argued the *pro hac vice* motion before Judge Ibarra. The court heard extensive argument from Gierlach and Albertini, who acknowledged that Miyashiro had consulted extensively with Albertini since 2002, both before and after Gierlach entered the case. 10/11/04 Tr. at 8-9, 28. Albertini filed an affidavit claiming he was "ready to go to trial," which caught Judge Ibarra by surprise because this was Albertini's first request for *pro hac vice* approval. Id. at 27. Further, Albertini acknowledged, when confronted by defense counsel, that he had served as *pro hac vice* counsel at least four other times in Hawaii, and still had no plans to take the Hawaii Bar. Id. at 15, 25. He also acknowledged appearing *pro hac vice* in three other states, including Alabama, Nevada and Florida. Id. at 22. Gierlach acknowledged that

he had never heard of another lawyer appearing more than twice as *pro hac vice* in Hawaii's courts. Id. at 32.

Judge Ibarra expressed concern about Albertini's extensive representation of Miyashiro before requesting or obtaining permission from the court, or even meeting Gierlach, and his frequent *pro hac vice* appearances in Hawaii:

> The impression that I had from reading these pleadings is that Mr. Albertini has practiced law in Hawaii before. And in this case Mr. Albertini has basically done work before associating or getting permission or before doing work under the supervision of local counsel, as a consultant, in essence, practicing law even before getting *pro hac vice* approval.

10/11/04 Tr. at 10. "It seems like he had done work coming into the state of Hawaii without retaining local counsel," the court observed, "it seems like [Miyashiro] met with Albertini before he had any other representation." Id. "The court would not be concerned if Mr. Albertini's first application was in this case." Id. at 8, 9, 35. "Is there any reason why he doesn't sit for the bar exam?" Id. at 14.

Although Albertini assured Judge Ibarra he had never been disciplined in California, when defense counsel searched court records he found a 1980 case disqualifying Albertini for breach of California's Code of Professional Conduct. Id. at 30, citing, *Chronometrics v. Sysgen, Schaefer and Fatt*, 110 Cal.App.3d 597, 168 Cal.Rptr. 196 (1980). Albertini had engaged in numerous *ex parte* communications with an opposing party without his lawyer's knowledge. Albertini denied to Judge Ibarra that he was sanctioned in *Chronometrics* or that he had acted in an

unprofessional manner. Id. at 36. "We're the ones that took it up on appeal," he said. Id. at 36. After the trial judge disqualified his firm because of Albertini's contacts with an opposing party, "I took it up on appeal and *I reversed him*." [emphasis added] Id. at 37. "That became big law cited many times in the state of California," said Albertini, "nothing about that case in any way do I feel any detriment coming in my direction." Id. "I'm proud of that case." Id.

Defense counsel disagreed. Id. at 39. "I urge the court to read it," he said, "because it does criticize his conduct." Id. The truth of the matter is Albertini never "reversed" the trial court. The California appellate court affirmed Albertini's personal disqualification because his conduct "violated Rule 7-1203 of the Rules of Professional Conduct." 168 Cal.Rptr. at 200. The court held:

> It is undisputed in the opposing declarations that Albertini did communicate with Fatt without the consent of his attorney of record in the litigation, the only matter controverted being whether the communication was "upon a subject of controversy." The trial court resolved this conflict against [Albertini].

168 Cal.Rptr. at 199. "We must take as true the fact that Albertini communicated with Fatt respecting a subject of controversy," the California court said, "and thus violated Rule 1-103 of the Rules of Professional Conduct." Id. "If the status or misconduct which is urged as a ground for disqualification will have a continuing effect on the judicial proceedings before the court, it is justified in refusing to permit the lawyer to participate in such proceedings." Id. at 202. "It was not an abuse of discretion to refuse to permit *the wrongfully obtained information* to be used by

Albertini directly in the proceedings before the court." Id. at 203 (emphasis added).

As such, the California trial judge's order disqualifying Albertini was not "reversed," and his disqualification because of rule violations in a decision that "became big law cited many times" was hardly a ruling of which Albertini should "be proud." Further, his false characterization of the *Chronometrics* case at the *pro hac vice* hearing clearly misled Judge Ibarra. 10/11/04 Tr. at 37. This California case, and the misrepresentations made to the court about its significance, were grounds alone to deny Albertini any *pro hac vice* role in Miyashiro's case.

Judge Ibarra also questioned Gierlach about the necessity of *pro hac vice* counsel when so many licensed lawyers were available in Hawaii to assist him. Id. at 7-8, 33-35. Gierlach claimed it was difficult to find local counsel because of Roehrig's reputation and political connections. Id. at 34. Miyashiro wrote letters to 12 Big Island lawyers, he said, and they did not respond. Id. at 8. Judge Ibarra noted that Hawaii has 5000 licensed lawyers. Id. at 34. Most, like Gierlach, have offices in Honolulu, and have never met or worked with Roehrig, who has lived and worked in Hilo since he passed the Hawaii bar exam in 1965. Id. Roehrig offered a list of 25 Hawaii lawyers that specialize in legal malpractice, three of which practice on the Big Island, and none of which were contacted by Miyashiro. Id. at 26.

Finally, while Miyashiro now complains that Albertini's role was improperly limited to associate status in his case, Gierlach told Judge Ibarra in October 2004 that he would gladly remain lead counsel, with Albertini "drafting pleadings that I can review and approve." Id. at 13-14. "If I

can have the assistance of Mr. Albertini," said Gierlach, "I [will] be present as lead counsel at all hearings." Id. at 14. Albertini also agreed to this limited status he presently enjoys in Miyashiro's case, and promised to serve in a supporting role. Id. at 28.

Judge Ibarra ruled as follows:

> [U]nder Rule 1.9 of the Hawaii Supreme Court, it gives the discretion of the presiding judge to allow the *pro hac vice*. In the [*Bank of Hawaii v. Kunimoto*, 91 Hawai'i 168, 45 P.3d 368 (2002)], there is no right or entitlement to apply for or be granted *pro hac vice* status before any state court. In this particular case the court is concerned, number one, that Mr. Albertini has been admitted *pro hac vice* status in Hawaii four other times[.] Secondly, Mr. Albertini can still be retained as consultant or paralegal, as Mr. Gierlach stated at the outset. In fact, Mr. Albertini has worked on this case with Mr. Gierlach. Third, Mr. Gierlach, as this court is familiar with, is very competent to handle trial in complex cases. Fourth, the court is not satisfied that there has been sufficient showing to show that of the total bar population, that Mr. Miyashiro would not be able to retain any other lawyer to assist Mr. Gierlach in the handling of the legal malpractice case. So the motion is denied.

10/11/04 Tr. at 39. Miyashiro's first motion for appointment of Albertini as *pro hac vice* counsel was denied "without prejudice." *See* Appendix E.

**b. The Second Motion.**

Albertini continued his work with Gierlach as a "paralegal." After Judge Ibarra's recusal in December 2004, Respondent Fifth Circuit Court Judge GEORGE M. MASUOKA was assigned to hear Miyashiro's case. On November 22, 2004, Miyashiro renewed his motion for appointment of Albertini as a *pro hac vice* assistant counsel with Gierlach in his case. Roehrig and his co-defendants filed similar objections to the motion, noting the number of qualified local lawyers available to take the case, Albertini's multiple *pro hac vice* appointments, his unauthorized practice of law working for Miyashiro without court approval, his disqualification for professional misconduct in the 1980 California appeal, and his misrepresentations to Judge Ibarra about the nature of that appeal.

On April 6, 2005, the parties appeared before Judge Masuoka to argue the second *pro hac vice* motion. During a recess the parties agreed that Albertini would be permitted to assist Gerlach as *pro hac vice* counsel, but only in non-court discovery matters and the drafting of pleadings. Although Miyashiro suggests otherwise in his Petition, the parties never agreed to Albertini's full *pro hac vice* lead trial counsel status:

> Mr. Albertini will be allowed to participate in non-court matters. At hearings Mr. Gierlach will do the appearances, and the issue of whether or not Mr. Albertini may participate in the trial is reserved.

4/6/05 Tr. at 3. Judge Masuoka agreed with the stipulation, but with the proviso that "anytime if the court feels Mr. Albertini is not conducting himself to the standards

that this court wants him to and in accordance with what the Court feels that the Hawaii Bar [and] the level of professionalism [require], this court will prohibit him from practicing at all." Id. at 13-14. "So if at any time he interrupts me or tries to speak out of turn or interrupts the proceeding, the court may take action immediately," the court told Gierlach, "you understand?" Id. at 14. Obviously Judge Masuoka's prior experience with Albertini – in addition to his review of Roehrig's opposition papers – led him to express this unusual warning to Gierlach about Albertini's future conduct in this case. Id. On September 1, 2005, Judge Masuoka filed an order permitting Albertini "to attend hearings and other court proceedings with David J. Gierlach, but Mr. Albertini is not allowed to argue or address the court[.]" *See* Appendix F at 3.

**c. The Third Motion.**

On August 28, 2006, only two months before trial, Miyashiro filed a third and final motion regarding Albertini's *pro hac vice* status, this time insisting that the court expand his role to lead counsel in this malpractice case. Roehrig, the only remaining defendant, reiterated his prior objections to Albertini's *pro hac vice* appearance, and questioned the need to change the limited *pro hac vice* arrangement agreed to by the parties in April 2005.

Moreover, during the 16 months between the April 2005 hearing commencing Albertini's limited *pro hac vice* status, and this third *pro hac vice* motion, Roehrig and his lawyers were able to observe his conduct during pre-trial discovery, and they did not like what they saw. First, Albertini utilized sealed documents from the Jack's Tours litigation to prepare his case, without telling opposing

counsel or obtaining the court's permission. Second, he made misstatements to the discovery master (a retired judge) about the scope of materials turned over to opposing counsel. Third, he caused substantial delays in discovery by filing late answers to interrogatories and requests for admission. Fourth, he improperly signaled his client during a deposition by kicking him under the table. Fifth, he refused to stipulate to the authenticity of depositions from the Jack's Tours litigation where Miyashiro had admitted to fraud and embezzlement in the family business, forcing Roehrig's lawyers to call reporters to authenticate the obviously authentic documents.

At the hearing on Miyashiro's third *pro hac vice* motion, Gierlach again argued that Albertini had spent more time working on the case than he had, and that he was too busy to proceed with trial as lead counsel. 9/19/06 Tr. at 18. "It is frankly, going to be a real hardship on myself and on Mr. Miyashiro if that knowledge cannot be used at trial." Id. Judge Masuoka pointed out that Gierlach filed the original complaint in 2003, served as lead counsel for three years, and that Miyashiro expressly agreed with Roehrig in 2005 that Gierlach would retain his role as lead counsel in this case. Id. at 22. The court ruled:

> This court also cautioned you, Mr. Gierlach, that in the event that Mr. Albertini didn't meet the court's professional standards, this court would revoke *pro hac vice* status and you would have to continue with the case. Likewise, this court also said that the court always considers local counsel as lead counsel but because of the agreement between yourself, Mr. Gierlach, and the opposing counsel saying you would agree to permit him to participate in the preparation of the case but not

> make any presentation to the court, this court, notwithstanding its better judgment, permitted him to come in *pro hac vice* on a limited basis. This court cannot see changing that. If this court were to change, I would go back to its original intention and say, "No, Mr. Gierlach. You originally took the case. You do the case." If you were too busy . . . you should not because you had the case once, so you had an idea of what it was, that it was dismissed without prejudice, and it was filed again. So you knew to a certain extent what the case was about because the rules required you to investigate prior to filing any complaint on behalf of any client. So under the circumstances, since this court has already permitted Mr. Albertini on a limited basis to appear *pro hac vice* and this was the agreement of the other counsel, this court is not going to revoke that order. But nor is it going to permit any expanded participation by Mr. Albertini.

9/19/06 Tr. at 22.

On November 13, 2006, Judge Masuoka filed an order denying Miyashiro's motion to appoint Albertini lead trial counsel. *See* Appendix G.

### 3. THE PETITION FOR WRIT OF MANDAMUS

On October 5, 2006, Miyashiro filed a petition for writ of mandamus in the Hawaii Supreme Court, asking that court to find that Judge Masuoka committed a "flagrant abuse of discretion" in refusing to appoint a California attorney as his lead trial counsel. *See* Petition, Appendix B. "Miyashiro has a constitutional right, grounded in the Fifth Amendment of the United States Constitution, to counsel of his choice in a civil case." Id. at 10. "He is

denied his counsel in the face of only specious reasoning." Id. "Neither Judge Ibarra nor Judge Masuoka have given reasonable explanations as to why *pro hac vice* status for trial has been denied." Id. at 13. On November 1, 2006, the Hawaii Supreme Court denied this petition:

> Granting Eugene Albertini full *pro hac vice* status in Civil No. 04-1-0211 was within the discretion of the circuit judge, *see* RSCSH 1.9, and the refusal to do so for the reasons for which *pro hac vice*, appearance was initially denied was not a flagrant and manifest abuse of discretion.

Petition, Appendix A at 1.

### 4. THE STATE COURT APPEAL

On January 11, 2007, Judge Masuoka filed an Amended Final Judgment dismissing all claims against Roehrig. *See* Appendix F. On January 22, 2007, Miyashiro appealed. *See* Appendix H. On January 29, 2007, he filed a statement of points on appeal including "whether the trial court erroneously failed to grant full *pro hac vice* status to Eugene J. Albertini." *See* Appendix I at 2.

As such, there has been no final ruling by the Hawaii Supreme Court on Albertini's *pro hac vice* status or Miyashiro's claim that he has a constitutional right to choose out-of-state counsel in a civil case. Moreover, the issue was not finally decided in the State mandamus proceeding, since the standard of review for an extraordinary writ is far higher than that of an ordinary appeal.

## ARGUMENT

### A. IN VIEW OF THE TRIAL COURT'S DISMISSAL OF THIS MALPRACTICE ACTION, BASED ON PETITIONER'S ACKNOWLEDGED EMBEZZLEMENT AND BREACH OF FIDUCIARY DUTY, THIS COURT SHOULD ALSO REFUSE TO ASSIST HIM IN HIS ATTEMPTS TO USE JUDICIAL PROCESS TO BENEFIT FROM HIS OWN FRAUDULENT CONDUCT.

On January 11, 2007, Judge Masuoka filed an Amended Judgment dismissing all Miyashiro's malpractice claims, based, in part, "on Plaintiff's admitted embezzlement and breach of fiduciary duty." *See* Appendix D. In his 2004 lawsuit, Miyashiro claimed that Roehrig, Judge Hara and their law firm breached an attorney/client agreement with him when they refused to aid his illegal and immoral conduct and improperly disclosed his embezzlement from Jack's Tours, which resulted in his expulsion from his family's successful transportation and tour company, and substantial loss of income. Judge Masuoka thereby refused to "aid a tortfeasor who invokes the court's jurisdiction to relieve it of the consequences of fraud." *Bondi v. Thornton International*, 421 F.Supp.2d 703, 713 (S.D.N.Y. 2006). This Court should do the same.

"The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract." *Kaiser Steel v. Mullins*, 455 U.S. 72, 77 (1982). "Denying judicial relief from an admitted wrongdoer is an effective means of deterring illegality." *Bateman Eichler, Hill Richards v. Berner*, 472 U.S. 299, 306 (1985); *see also*, *McMullen v. Hoffman*, 174 U.S. 639, 669 (1899) ("in that way the public secures the benefit of a rigid adherence to

the law"); *Higgins v. McCrea*, 116 U.S. 671, 685 (1886) ("he who comes here for relief must draw his justice from pure fountains"); *Nisselson v. Lernout*, 469 F.3d 143, 152 (1st Cir. 2006) ("a basis for dismissing suits whenever a plaintiff has played any role in the harm producing activity"); *Knauer v. Jonathon Roberts Fin. Group*, 348 F.3d 230, 235 (7th Cir. 2003) ("the wrongdoer must not be allowed to profit from his wrong"); *Arena Football League v. Roemer*, 9 F.Supp.2d 889, 898 (D.Ill. 1998) ("courts will not aid a fraudfeasor who invokes the court's jurisdiction to relieve him of the consequences of his fraud"); *Choquette v. Isacoff*, 836 N.E.2d 329, 332 (Mass.App. 2005) ("courts will not lend aid to parties who base their cause of action on their own immoral or illegal acts"); *Mettes v. Quinn*, 411 N.E.2d 549, 551 (Ill.App. 1980) ("this refusal to aid derives not from the consideration of the defendant, but from a desire to see that those who transgress the moral or criminal code shall not receive aid from the judicial branch of government.")

This doctrine has also been applied to legal malpractice claims, where courts have uniformly refused to award damages to clients who have committed fraud. "Since the basis of the plaintiff's action in the present case is an attempt to reduce the economic consequences of his fraudulent conduct by recovering from his attorney, we hold that the trial court did not err in dismissing the complaint with prejudice." *Goldstein v. Lustig*, 507 N.E.2d 164, 170 (Ill.App. 1987); *see* also, *Pantely v. Garris, Garris & Garris*, 447 N.W.2d 864, 869 (Mich.App. 1989) ("the proximate cause of Pantely's claimed injuries was her act of knowingly committing perjury"); *Evans v. Cameron*, 360 N.W.2d 25 (Wis. 1985) ("although the public interest is served by discouraging attorney misconduct, it would be

inappropriate to promote that interest by removing the damage to those who deliberately and willfully lie under oath in bankruptcy proceedings"); *Robins v. Lasky*, 462 N.E.2d 774, 779 (Ill.App. 1984) ("we pass no judgment on the advice given by the defendants, as our refusal to aid the plaintiff is a decision based upon his admitted attempt to evade the law.")

## B. PETITIONER DOES NOT HAVE A CONSTITUTIONAL RIGHT TO CHOOSE OUT-OF-STATE LEAD TRIAL COUNSEL IN A CIVIL CASE, ESPECIALLY IN LIGHT OF COUNSEL'S DISQUALIFICATION BY A CALIFORNIA COURT, MULTIPLE *PRO HAC VICE* APPEARANCES, UNAUTHORIZED PRACTICE OF LAW, DISCOVERY MISCONDUCT, AND A STIPULATION BY PETITIONER THAT HIS *PRO HAC VICE* LAWYER BE LIMITED TO A SUPPORTING ROLE.

"Since the founding of the Republic," this Court declared in 1979, "the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions." *Leis v. Flynt*, 439 U.S. 438, 442 (1979). "The States prescribe the qualifications for admission to practice and the standards of professional conduct." Id. "The Constitution does not require that because a lawyer has been admitted to the bar of one State, he or she must be allowed to practice in another." Id. at 443. While "the practice of courts in most States is to allow an out-of-state lawyer the privilege of appearing upon motion," the Court declared, "it is not a right granted either by statute or the Constitution." Id. at 441-442. "There is no right of federal origin that permits

such lawyers to appear in state courts without meeting that State's bar admission requirements." Id. at 443.

Although the *Leis* Court held that out-of-state lawyers have no constitutional right to appear *pro hac vice* in a civil case, it "did not reach the issue of whether the constitutional rights of [the parties] had also been violated." Id. at 442 n.4. To date, this Court has not exprcssly ruled on whether civil litigants have such a right, although the holding in *Leis* clearly suggested (as the dissent itself noted) "that a client's interest in having out-of-state counsel is implicated by this decision." Id. Indeed, how could State and federal courts enforce the holding in *Leis* if out-of-state counsel can avoid its mandate by merely having his client appeal the denial of his *pro hac vice* status, such as occurred here? *See Kentucky West Virginia Gas Company v. Pennsylvania Public Utility Commission*, 837 F.2d 600, 618 (3d Cir.), *cert. denied*, 488 U.S. 941 (1988) ("[t]he Supreme Court has not recognized a constitutional right to counsel in a civil case"); *Obert v. Republic Western Insurance Company*, 190 F.Supp.2d 279, 298 (D.R.I. 2002) ("Republic Western has no constitutional right to counsel of its choice.")

Miyashiro makes much of this Court's recent ruling in *United States v. Cuauhtemoc Gonzalez-Lopez*, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006), where it addressed the question of a defendant's right to choose out-of-state counsel in a criminal case. The *Gonzalez-Lopez* Court was not asked to decide whether the 6th Amendment right to choice of counsel in a criminal prosecution includes out-of-state lawyers, since that issue was abandoned by the Government before the case reached the Supreme Court. *See* 126 S.Ct. at 2561 ("the government does not dispute the 8th Circuit's conclusion in this case that the District

Court erroneously deprived respondent of his counsel of choice.") Regardless, the Court did not dispute the 8th Circuit's finding that Gonzalez-Lopez had a 6th Amendment right to choose a California lawyer to represent him in a Missouri prosecution. Id.

Neither *Gonzales-Lopez* nor the 6th Amendment, however, mentions civil litigants. The right to counsel in a civil case – to the extent it exists – has been found in the due process clauses of the 5th and 14th Amendments, not the 6th. *See Obert*, supra, 190 F.Supp.2d at 298. According to the *Obert* court:

> The right to practice *pro hac vice* before a court is not granted by statute or by the Constitution. [Citing *Leis*.] In criminal cases, courts must comply with the Sixth Amendment requirements of a defendant's right to counsel of his choice. This right, however, is not absolute and may give way to the court's need to control the orderly conduct of justice. See, *United States v. Collins*, 920 F.2d 619, 624-26 (10th Cir. 1990). *The instant case, of course, is a civil action, and Republic Western has no constitutional right to counsel of his choice.*

*Obert*, supra, 190 F.Supp.2d at 298 (emphasis added). "We note at the outset that certain distinctions can be made between the rights of civil litigants and those of criminal defendants," observed another court. *Potashnick v. Port City Construction Company*, 609 F.2d 1101, 1118 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980). "A criminal defendant faced with a potential loss of personal liberty has much more at stake than a civil litigant asserting or contesting a claim for damages," the *Potashnick* court noted, "and for this reason *the law affords greater protection to the criminal defendant's rights*." Id. (emphasis added). Again, "[t]he

Supreme Court has not recognized a constitutional right to counsel in a civil case." *Kentucky West Virginia Gas Company*, *supra*, 837 F.2d at 618. Nor has this Court ever ruled, as Miyashiro contends it has, that a plaintiff in a legal malpractice action has a constitutional or federal statutory right to have the trial court appoint a *pro hac vice* lawyer as lead trial counsel.

According to Miyashiro, he has a constitutional right to have the Hawaii courts permit him to use an out-of-state lawyer as lead counsel in a civil case. Unless a Hawaii court finds Albertini "unfit," insists Miyashiro, it must allow this California lawyer unlimited access to its courts.

Miyashiro is mistaken.

First, neither this Court nor any lower federal court has ever ruled that civil litigants have a constitutional right to choose out-of-state lawyers as their lead counsel under the *pro hac vice* rules. Judge Masuoka allowed Albertini to serve as Miyashiro's second lawyer, and he is already represented by Gierlach, an able and experienced Hawaii counsel of his choice. *See*, *e.g.*, *Meschi v. Iverson*, 805 N.E.2d 72, 74 (Mass.App. 2004) ("Mr. Ryan's colleagues, as members of the Massachusetts bar, were and are available to represent the plaintiffs [and may] enjoy the benefit of Mr. Ryan's consultation and advice in that exercise.")

Second, "*pro hac vice*" means "for this one occasion." *Obert, supra*, 190 F.Supp.2d at 297. As noted, Albertini has already been granted *pro hac vice* status four times in Hawaii's courts, and his repeated appearances in that regard suggest he is utilizing that status to circumvent the licensing requirements complied with by every other

lawyer practicing in the State. This alone is grounds for Hawaii's judges to limit Albertini's participation in this case.

Third, contrary to Miyashiro's claims in the Petition, Roehrig introduced substantial evidence of misconduct, unethical behavior, and other problems that made it inadvisable to appoint Albertini lead counsel, including the unauthorized practice of law before being granted limited *pro hac vice* status, and extensive discovery violations. *See Obert, supra*, 190 F.Supp.2d at 298 ("this right, however, is not absolute and may give way to the court's need to control the orderly conduct of justice.")

Fourth, Albertini was criticized in a 1980 California decision cited over 170 times since its publication as a classic example of attorney disqualification based on improper contact with opposing parties. *See Chronometrics, supra*. Clearly that case, which was misrepresented by Albertini during Judge Ibarra's October 11, 2004, hearing and omitted from the Petition before this Court, is grounds alone to limit his *pro hac vice* participation to a supporting role in this case. *See, e.g., Meschi, supra*, 805 N.E.2nd at 74, n.9 ("his decision to address [the opposing party] raises serious questions bearing adversely on whether to extend to him permission to act as Massachusetts [*pro hac vice*] counsel in the instant matter.")

## C. PETITIONER FAILS TO INFORM THIS COURT THAT JUDGMENT HAS BEEN ENTERED AGAINST HIM IN THIS MALPRACTICE CASE, PETITIONER HAS APPEALED TO THE HAWAII APPELLATE COURTS, AND HE HAS LISTED THIS *PRO HAC VICE* RULING IN HIS POINTS ON APPEAL.

This Petition for Writ of Certiorari is misleading on the subject of finality. Miyashiro suggests a trial is pending in State court, and that absent this Court's immediate intervention, he will be denied his right to out-of-state lead trial counsel of his choice. In fact, before this Petition was filed, Judge George Masuoka granted four separate summary judgment motions (opposed in pleadings drafted by lawyer Albertini) and filed a judgment in Roehrig's favor on all claims. Miyashiro has noticed an appeal to the Hawaii Intermediate Court of Appeals, and filed a declaration listing the three *pro hac vice* trial orders challenged here as one of his grounds for reversal on appeal. As such, Hawaii's appellate courts have yet to finally rule on the issue before this Court.

"Under 28 U.S.C. § 1257(a) this Court's jurisdiction is limited to review of 'final judgments or decrees rendered by the highest court of a State in which the decision could be had.'" *Johnson v. California*, 541 U.S. 428, 429 (2004). "Compliance with the provisions of Section 1257 is an essential prerequisite to our deciding the merits of a case brought here under that section." Id. at 431; *see also*, *Flynt v. Ohio*, 451 U.S. 619, 620 (1981) ("[i]n general, the final judgment rule has been interpreted to preclude reviewability where anything further remains to be determined by a State court[.]") "The finality requirement," this Court has said:

> serves several ends: (1) it avoids piecemeal review of State court decisions; (2) it avoids giving advisory opinions in cases where there may be no real "case" or "controversy," [and] (3) it limits review of State court determinations of federal constitutional issues to leave at a minimum federal intrusion into State affairs.

*North Dakota State Board of Pharmacy v. Snyder's Drug Stores*, 414 U.S. 156, 159 (1973). "This requirement is not one of those technicalities to be easily scorned," the Court declared, "[i]t is an important factor in the smooth working of our federal system." Id., quoting *Radio Station WOW v. Johnson*, 326 U.S. 120, 124 (1945).

There are exceptions to this rule. "Only in very few situations, where intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for federal appellate jurisdiction." Id. "In *Cox Broadcasting Corporation v. Cohen*, 420 U.S. 469, 482 (1975), we described four exceptional categories to be regarded as 'final' on the federal issue despite the ordering of further proceedings in the lower State courts." *Johnson*, supra, 541 U.S. at 429-430. These categories include: (1) cases where the ruling renders further State proceedings preordained; (2) cases where the issue will survive and require decision regardless of further State proceedings; (3) cases where further State proceedings will bar review of an important federal issue; and (4) cases where resolution of the federal issue would be preclusive of any further State proceedings. *Cox Broadcasting*, 420 U.S. at 482. None of these exceptions apply here.

First, as noted, judgment has been entered in this case and Miyashiro has noticed an appeal in Hawaii's appellate courts. *See* Appendix E. He has filed a declaration of points

on appeal including the three *pro hac vice* rulings entered by the trial court which he would have this Court review by certiorari. *See* Appendix F.

Second, these *pro hac vice* trial rulings will be reviewed by the Hawaii Intermediate Court of Appeals, and if necessary, the Hawaii Supreme Court, for abuse of discretion. A different standard of review attaches to a petition for writ of mandamus. "A writ of mandamus," the Hawaii Supreme Court noted in its order, "will not issue unless the petition demonstrates a clear and indisputable right to relief and a lack of alternative means to redress adequately the alleged wrong or obtain the requested relief." *See* Petition, Appendix A at 1, citing *Kema v. Gaddis*, 982 P.2d 334, 338 (Hawaii 1999). "Where a court has discretion to act, mandamus will not lie to interfere with or control the exercise of that discretion, even when the judge has acted erroneously, unless the judge has exceeded his or her jurisdiction, has committed a flagrant and manifest abuse of discretion, or has refused to act on a subject properly before the court[.]" Id. A ruling based on this limited standard of review is therefore not binding in Miyashiro's pending State court appeal.

While this Court has permitted interlocutory review of collateral orders during civil litigation, it has limited such review to orders "effectively unreviewable on appeal from a final judgment." *Firestone Tire and Rubber v. Risjord*, 449 U.S. 368, 374 (1981); *see also*, *United States v. McDonald*, 435 U.S. 850, 860 (1978) ("the legal and practical value of which would be destroyed if it were not vindicated before trial.") In this case, the trial court's *pro hac vice* rulings are clearly "reviewable," and will be reviewed in Miyashiro's State court appeal. "The resolution of this question can await final judgment without any adverse

effect upon important federal interests." *Flynt v. Ohio*, 451 U.S. 619, 622 (1981); *see* also, *Carpenter v. Gomez*, 516 U.S. 981 (1995) ("the issue would remain open for further review when it acts on the direct appeal from petitioner's conviction.")

## CONCLUSION

Respondent STANLEY H. ROEHRIG respectfully requests that this Court deny the Petition for Writ of Certiorari.

March 1, 2007

Respectfully submitted,

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IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI'I

| | |
|---|---|
| GEORGE MIYASHIRO,<br>Plaintiff,<br><br>vs.<br><br>ROEHRIG, ROEHRIG, WILSON & HARA; STANLEY H. ROEHRIG, AAL, ALC; GLENN S. HARA, AAL; CAROL MIYASHIRO; JEFF MIYASHIRO; TITLE GUARANTY CO. | **CIVIL NO. 04-1-0211** (Hilo)<br><br>ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BASED ON PLAINTIFF'S ADMITTED EMBEZZLEMENT AND BREACH OF FIDUCIARY DUTY (FILED SEPT. 11, 2006) |

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|---|---|
| and DOE DEFENDANTS 1-100, Defendants. | ) Date: October 16, 2006<br>) Time: 1:00 p.m.<br>) Judge: George M. Masuoka<br>) (Filed Dec. 28, 2006)<br>) |

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BASED ON PLAINTIFF'S ADMITTED EMBEZZLEMENT AND BREACH OF FIDUCIARY DUTY (FILED SEPT. 11, 2006)

Defendant's Motion for Summary Judgment Based on Plaintiff's Admitted Embezzlement and Breach of Fiduciary Duty (Filed Sept. 11, 2006) was heard by the Honorable George M. Masuoka at 1:00 p.m. on October 16, 2006. David J. Gierlach represented Plaintiff. Brian J. De Lima and Keith K. Hiraoka represented Defendant Stanley H. Roehrig, AAL, ALC. The Court, having considered the written and oral submissions of the parties and being fully advised, orders as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant's motion be and is hereby GRANTED.

Dated: Lihu'e, Hawai'i, Dec. 28, 2006.

/s/ George M. Masuoka [SEAL]
Judge of the Above-Entitled Court

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IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI'I

| | |
|---|---|
| GEORGE MIYASHIRO,<br>Plaintiff,<br>vs.<br>ROEHRIG, ROEHRIG, WILSON & HARA; STANLEY H. ROEHRIG, AAL, ALC; GLENN S. HARA, AAL; CAROL MIYASHIRO; JEFF MIYASHIRO; TITLE GUARANTY CO. | **CIVIL NO. 04-1-0211** (Hilo)<br>ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY ON HAWAI'I RULES OF PROFESSIONAL CONDUCT (FILED SEPT. 11, 2006)<br>Date: October 16, 2006 |

and DOE DEFENDANTS 1-100,
Defendants.

) Time: 1:00 p.m.
) Judge: George M. Masuoka
) (Filed Dec. 28, 2006)

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON HAWAI'I RULES OF PROFESSIONAL CONDUCT (FILED SEPT. 11, 2006)

Defendant's Motion for Summary Judgment on Hawai'i Rules of Professional Conduct (Filed Sept. 11, 2006) was heard by the Honorable George M. Masuoka at 1:00 p.m. on October 16, 2006. David J. Gierlach represented Plaintiff. Brian J. De Lima and Keith K. Hiraoka represented defendant Stanley H. Roehrig, AAL, ALC. The Court, having considered the written and oral submissions of the parties and being fully advised, orders as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant's motion be and is hereby GRANTED.

Dated: Lihu'e, Hawai'i, Dec. 28, 2006.

/s/ George M. Masuoka [SEAL]
Judge of the Above-Entitled Court

Appendix C-1

168 Cal.Rptr. 196

Court of Appeal, Second District, Division 5, California.

CHRONOMETRICS, INC., a California Corporation, and Facit-Chronometrics, Inc., a California Corporation, Cross-Complainants and Appellants,

v.

SYSGEN, INC., Robert J. Schaefer and Harold J. Fatt, Cross-Defendants and Respondents.

Civ. 55128.

Sept. 25, 1980.

Sackin & Middleton, by Louis A. Sackin, Los Angeles, for cross-complainants and appellants.

McKenna & Fitting, Aaron M. Peck, I. Bruce Speiser, and Edmond M. Connor, Los Angeles, for cross-defendants and respondents.

DOWDS,* Associate Justice.

Defendants and cross-complainants in this civil action appeal from an order of court that their attorneys, the firm of Albertini & Gill ("the law firm") be disqualified and prohibited from acting as attorneys of record for or otherwise serving or assisting as counsel to them in such action.[1] This order was issued after a hearing pursuant to an order to show cause which had been issued after notice to Eugene J. Albertini, a member of the law firm. The

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* Assigned by the Chairperson of the Judicial Council.

[1] This order is appealable either as a final order upon a collateral matter under Code of Civil Procedure section 904.1, subdivision (a), or as an order granting an injunction under subdivision (f) of the same statute. (*See Meehan v. Hopps* (1955) 45 Cal.2d 213, 288 P.2d 267; *Kraus v. Davis* (1970) 6 Cal.App.3d 484, 487, 85 Cal.Rptr. 846.)

application for the order to show cause was supported by declarations of Harold Fatt, Morton Stein, and I. Bruce Speiser.

Fatt's declaration stated that he is a defendant in *Marshall, etc. v. Schaefer, et al.*, L.A.S.C. No. WEC 42370 and a cross-defendant in *Chronometrics, Inc., et al. v. Sysgen, Inc., et al.*, L.A.S.C. No. WEC 39344 ("the litigation") and that at all times since the inception of the litigation the law firm has been counsel of record for parties adverse to him. He further stated that on or about July 14, 1978, he received a telephone call from Albertini who said he was calling in his capacity as counsel for Gourmet Wines, Ltd., an entity with which Fatt had been associated, and as President of Chronometrics, Inc., an entity of which Fatt is a shareholder. Albertini stated his call had nothing to do with the litigation, but in fact during the conversation he said he was surprised Fatt was represented by the same counsel as those representing another party, Robert Schaefer, and invited Fatt to visit him in his office so that he could fully advise Fatt of facts relevant to his status in the litigation of which he believed Fatt had no knowledge. Albertini asked whether Fatt knew that, at the time he loaned money to Sysgen, Inc., a party to the litigation, Schaefer, its president, had $120,000 on deposit in a bank. Albertini indicated that there was a possibility that Fatt could be dismissed from the litigation.

Fatt's declaration further stated that Albertini telephoned him frequently in the ensuing days, encouraging him to come to Albertini's office to discuss facts affecting Fatt's position in the litigation and asking him for information concerning matters in issue in the litigation,

including dates relevant to the corporate existence of Sysgen, Inc.

Fatt declared that the longest such telephone call, lasting over 45 minutes, occurred on July 23, 1978, and in such call Albertini asked whether or not Fatt was still a partner with Schaefer and if not when he withdrew, stating that these were "main issues in the litigation," discussed Fatt's supposed unawareness of the assets transferred to Sysgen, Inc., and the source of such assets, asked when Fatt became associated with Sysgen, Inc., and the date on which he terminated such association, characterized Schaefer as a "crook," mentioned his inability to convince the district attorney to prosecute Schaefer, described his persistence in seeking to recover monies supposedly paid by him to Schaefer, discussed Schaefer's supposed failure to pay his bills, despite the fact that he purportedly had received approximately $100,000 by virtue of a loan on his house, inquired whether Sysgen, Inc., was based in Warren, Ohio, and whether such presence was maintained for the purpose of "hiding funds" so as to avoid an attachment and discussed information germane to Schaefer's activities in the computer software industry. Albertini again urged Fatt to visit with him so that he could apprise Fatt of facts that might cause a change of attitude in the way Fatt viewed the litigation.

In a call on August 4, 1978, according to Fatt's declaration, Albertini "indicated that (Fatt's) counsel of record in the litigation ... was not adequately representing (Fatt's) interests" and again invited his visit. By the third week in August 1978, according to Fatt, he had had eight to ten such telephone conversations with Albertini, all placed by the latter except that in one instance Fatt returned a call made to him while he was in a meeting. In

one of the last conversations, Albertini said that he did not have anything against Fatt but, because Schaefer was hiding his assets, Albertini would be required to satisfy any judgment and accordingly a meeting and eventual settlement would be in Fatt's interest.

Fatt further declared that these discussions made him "very nervous" about his status in the litigation and that he accordingly consulted an attorney other than his counsel of record in the litigation and that attorney communicated with Albertini. On January 16, 1979, Fatt's accountant (Stein) told him he had been called by Albertini who requested him to suggest to Fatt that he (Fatt) meet with Albertini. Fatt then decided, he said, for the first time to advise his counsel of record of these communications and did so on January 31, 1979. His declaration was dated February 2, 1979.

A declaration of Morton Stein averred that on January 14 or 15, 1979, Albertini called him at his residence and requested that he ask Fatt to consider meeting with Albertini concerning litigation involving them. Albertini stated, in response to an inquiry from Stein, that he would insist that Fatt have an attorney present at the meeting. Stein declared that he passed this information on to Fatt on or about January 16, 1979, and within the next few days received a telephone call and a letter from Albertini thanking him for his cooperation.

The third declaration presented in support of the application for an order to show cause was that of I. Bruce Speiser, who declared that he was a member of the State Bar of California, a member of the law firm of McKenna & Fitting, and counsel for Fatt, among others, in the litigation. Speiser declared that he did not learn of the

communications from Albertini to Fatt concerning matters in controversy in said actions until January 26, 1979, and, that neither he nor any other attorney at McKenna & Fitting authorized or consented to such communications.

Declarations of Eugene J. Albertini, Barry I. Gold, and Robert Miles Runyan were filed on the return date of the order to show cause in opposition to the proposed disqualification of the law firm. Albertini denied that he ever discussed settlement with Fatt or any other defendant in the litigation, stated that he had known Fatt for many years and was the attorney for Runyan. He stated that in May or early June 1978, Runyan notified him that he had received intimations through mutual friends of Fatt's and his that Fatt desired to settle the litigation. On June 20, 1978, Albertini declared, he telephoned Fatt, told him he was calling him only as the former attorney of Gourmet Wines and asked Fatt about documents Albertini had been asked to produce as a witness in a certain lawsuit (apparently different from the litigation described above). After this discussion was finished, Albertini averred, Fatt asked if it was all right to talk to Albertini about the current litigation between himself and Chronometrics. Albertini declared that he told Fatt he could only discuss settlement with Fatt in the presence of Fatt's attorney. There was some discussion about Fatt's obtaining attorneys other than McKenna & Fitting. On July 13, 1978, Albertini telephoned Fatt and asked him if he had obtained another attorney for the purpose of entering into settlement negotiations and Fatt said he intended to do so but had not yet found another lawyer and asked Albertini to call back in about a week. On July 20, 1978, Albertini called back and Fatt said he had not yet found another lawyer but would be contacting Albertini shortly. On August 8,

1978, Fatt called Albertini and told him he had retained Jonathan Klar who would be contacting Albertini shortly. On August 23, 1978, Albertini was contacted by Klar and they discussed settlement. Klar said he would look into the matter further and on September 14 and 15, 1978, Albertini and Klar held settlement discussions. Further negotiations by correspondence between Albertini and Klar did not result in a settlement and the negotiations were terminated in a telephone conversation on January 26, 1979. Albertini thereafter called Stein, to find out if he knew whether Fatt was sincere in his expressed desire to settle the litigation. Albertini denied that he ever communicated or discussed with Fatt facts and matters which are the subject of the litigation.

Gold's declaration stated that he was attorney for the plaintiff in an action entitled McHale vs. Hilson, et al., Los Angeles Superior Court No. WEC 32912, and that in connection with that lawsuit he had discussed with Albertini various transactions and documents involving Gourmet Wines and that Albertini had indicated that he would seek out some of the managers or officers of Gourmet Wines and endeavor to obtain information needed in respect of that lawsuit that he did not have.

Runyan's declaration stated that he was president and principal shareholder of a corporation of which Albertini was the attorney and Fatt was a former officer and employee. Runyan declared that about the middle of June 1978, an acquaintance who also knew Fatt told him that Fatt wished to resolve his differences with Runyan and that he informed Albertini of this information a few days later.

On February 21, 1979, the trial court made an order that the law firm be disqualified and prohibited from acting as attorneys of record for or otherwise serving or assisting as counsel to Chronometrics, Inc., and Facit-Chronometrics, Inc., in the instant action and those two corporations have appealed.

(1) Rule 7-103 of the California Rules of Professional Conduct provides in part that "(a) member of the State Bar shall not communicate directly or indirectly with a party whom he knows to be represented by counsel upon a subject of controversy, without the express consent of such counsel." It is undisputed in the opposing declarations that Albertini did communicate with Fatt without the consent of his attorney of record in the litigation, the only matter controverted being whether the communication was "upon a subject of controversy." The trial court resolved this conflict against appellants. As stated in *Fuller v. Lindenbaum* (1938) 29 Cal.App.2d 227, 230, 84 P.2d 155, 157 "in the consideration of an appeal from an order made upon affidavits involving the decision of a question of fact, an appellate court is bound by the same rule that controls it where oral testimony is presented for review. If there is any conflict in the affidavits, those in favor of the prevailing party must be taken as true, and the facts stated therein must be considered established."[2]

Accordingly, we must take as true the fact that Albertini communicated with Fatt respecting a subject of controversy, knowing that he was represented by counsel, without the consent of such counsel, and thus violated rule

[2] A declaration under penalty of perjury is the legal equivalent of an affidavit under Code of Civil Procedure section 2015.5.

7-103 of the Rules of Professional Conduct (West's Ann.Bus. & Prof.Code (1974 ed., 1980 cum.supp.), § 6076, at p. 96; Deering's Cal.Codes Ann.Rules (1980 ed.) at p. 293). Whether such a violation authorizes the trial court to disqualify him and his law firm from acting as counsel in an action which related to the subject in controversy appears not to have been directly decided in California. Respondents cite four federal cases which they contend support their position that a trial court has authority to disqualify an attorney and his law firm from continuing to represent a party "when the attorney compromises the integrity of the litigation through a breach of legal ethics." They particularly rely on the language of *Ceramco, Inc. v. Lee Pharmaceuticals* (2d Cir. 1975) 510 F.2d 268, 270-271: "The district court was incorrect in its view that the various bar associations constitute the only proper forum for investigation of a claim of professional misconduct. On the contrary, the courts have not only the power but also the duty and responsibility to disqualify counsel for unethical conduct prejudicial to his adversaries."

The holding of the *Ceramco* case does not necessarily support respondents' position. The court's jurisdiction over the defendant Lee Pharmaceuticals and the propriety of venue in the Eastern District of New York were issues in the case. An attorney associated with the law firm representing the plaintiff telephoned defendant's order department and, without identifying himself, asked for and obtained the names of customers with whom defendant did business in that district. The court of appeals affirmed the denial by the district court of defendant's motion to disqualify the law firm representing plaintiff. While, it said, the lawyer's conduct was not to be commended, it was not the kind of conduct which prior decisions indicated should

result in disqualification. It pointed out that the circumstances of such cases indicating "the need to enforce the lawyer's duty of absolute fidelity and to guard against the inadvertent use of confidential information" were not present in the case under consideration and no other compelling reason for disqualification appeared. (*Id.* at p. 271.)

In *United States v. Clarkson* (4th Cir. 1977) 567 F.2d 270, a lawyer who prepared tax returns for taxpayers and was later accused of criminal tax fraud was disqualified from further representing taxpayers on tax matters because of at least a potential conflict of interest. The trial court's order finding him in contempt for violating the order was affirmed.

In *Gas-A-Tron of Arizona v. Union Oil Co. of California* (9th Cir. 1976) 534 F.2d 1322, the court of appeals recognized the principle that a lawyer may be disqualified from representing a party against a former client where he may be in a position to use confidential information against such client, but held that the principle had been wrongly applied in the case. Plaintiff's lawyers had been disqualified because an associate of the firm had formerly worked for a large law firm which had represented some of the defendants in certain matters. The order of disqualification was reversed because there was no showing that the lawyer had actually obtained any confidential information or had worked on matters substantially related to the pending litigation.

The fourth federal case cited is *In re Gopman* (5th Cir. 1976) 531 F.2d 262. In that case, because of an obvious

conflict of interest, a lawyer was disqualified from simultaneously representing in a grand jury investigation certain labor unions and certain officers thereof.

For California authority, respondents cite Code of Civil Procedure section 128, which states: "Every court shall have power: . . . To control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter appertaining thereto; . . . " They also refer us to *Comden v. Superior Court* (1978) 20 Cal.3d 906, 145 Cal.Rptr. 9, 576 P.2d 971, which upheld a court order requiring a law firm representing the plaintiff to withdraw from the case on the ground that Rule 2-111(A)(4) of the Rules of Professional Conduct, as it then existed, required withdrawal when the attorney "knows or should know that he . . . ought to be called as a witness on behalf of his client. . . . " They particularly call our attention to footnote 4 found on page 916, 145 Cal.Rptr. at 13-14, 576 P.2d at 975-76 of that case, where the Supreme Court said:

> "Application of rule 2-111 is not limited to breaches of standards of conduct for which discipline may be imposed, although the rule manifestly has application for that purpose. (*See* Bus. & Prof.Code, §§ 6076, 6077.) We have this year held that a trial court has authority to recuse a prosecutor on the basis that he may be biased against a defendant. (*People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, 137 Cal.Rptr. 476, 561 P.2d 1164) We noted in that case: 'It has long been established in civil cases that the court has the power, on motion of a party, to disqualify an opposing attorney from participating in a trial when, for example, the attorney improperly seeks

> to proceed against a former client. (Citations.)' (*Id.* at pp. 263-264(, 137 Cal.Rptr. 476, 561 P.2d 1164); *see also Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564(, 15 P.2d 505); *Big Bear Mun. Water Dist. v. Superior Court* (1969) 269 Cal.App.2d 919(, 75 Cal.Rptr. 580)) Although there may be greater reason for disqualifying an attorney in a conflict of interest case, the court nevertheless has authority to disqualify in any instance when, as here, the court reasonably deems it necessary to ' . . . control in furtherance of justice, the conduct of its ministerial officers. . . . ' (Code Civ.Proc., § 128; *see People v. Superior Court, supra*, 19 Cal.3d 255, 261, fn. 4(, 137 Cal.Rptr. 476, 561 P.2d 1164.))"

In *Bauguess v. Paine* (1978) 22 Cal.3d 626, 150 Cal.Rptr. 461, 586 P.2d 942, the Supreme Court reversed an order requiring a party's attorney to pay an opposing party's attorney's fees occasioned by a mistrial which the trial court believed was caused by the misconduct of the attorney against whom the sanction was levied. The court recognized that all courts have supervisory or administrative powers to enable them to carry out their duties and that this power has been expressly recognized by the Legislature in Code of Civil Procedure section 128. (*Id.* at pp. 634-636, 150 Cal.Rptr. 461, 586 P.2d 942.) It pointed out that the traditional American practice has been for each party to bear his or her attorney's fees and determined that the case it was considering did not fall within any of the recognized exceptions to the rule. (*Id.* at pp. 634-637, 150 Cal.Rptr. 461, 586 P.2d 942.) It then considered whether the court might award attorney's fees as a sanction under its supervisory power. It recognized that "(p)ursuant to this power, a court may take appropriate action to secure compliance with its orders, to punish

contempt, and to control its proceedings." (*Id.* at p. 637, 150 Cal.Rptr. at p. 467, 586 P.2d at p. 948.) It declined, however, to permit the award of attorney's fees as a sanction for misconduct, stating: "It would be both unnecessary and unwise to permit trial courts to use fee awards as sanctions apart from those situations authorized by statute. If an attorney's conduct is disruptive of court processes or disrespectful of the court itself, there is ample power to punish the misconduct as contempt." (*Id.* at pp. 637-638, 150 Cal.Rptr. at pp. 467-68, 586 P.2d at pp. 948-49.) While the award of attorney's fees is a different situation from the instant case, the teaching of Bauguess as applied to this case is that the power of a trial court to control its proceedings is not unlimited and the availability of remedies other than sanctions unauthorized by statute should be considered.

*Pepper v. Superior Court* (1977) 76 Cal.App.3d 252, 142 Cal.Rptr. 759, is a case involving to some extent Rule 7-103 of the Rules of Professional Conduct. An attorney brought on behalf of a client a class action against a country club of which both the attorney and the client were members, alleging that the club's imposition of transfer fees upon sales of memberships was illegal and contrary to the club's bylaws. The trial court disqualified the attorney on the basis of what it perceived to be a conflict of interest because of the attorney's membership in the defendant club. The attorney sought a writ of mandate from the Court of Appeal, which was denied because, the appellate court determined, he had unclean hands in that he had communicated directly with the Board of Directors of the club about the litigation without the consent of its counsel in violation of Rule 7-103. The client then died, naming the attorney as his co-executor. The trial court

denied the attorney's motion to be substituted as party plaintiff for the deceased client and the attorney again sought a writ of mandate, this time successfully. The Court of Appeal held that the unclean hands with which it had previously been concerned was in a different transaction, though a related one, from the instant matter, that its effect had been substantially attenuated by the death of the client and that the petition could not longer be denied on that basis. It concluded that the attorney's membership in the club did not in itself create a conflict of interest which would bar him from suing the club, decided that he was entitled to be substituted as party plaintiff as the co-executor and ordered the trial court to vacate its order denying the substitution. While there are obviously some differences from the instant case, Pepper indicates that a violation of Rule 7-103 should not necessarily bar an attorney for all time from participating in a lawsuit in connection with which the violation occurred.

The Supreme Court has stated in respect of Rule 12, the predecessor of Rule 7-103, that "The rule was designed to permit an attorney to function adequately in his proper role and to prevent the opposing counsel from impeding his performance in such role." (*Mitton v. State Bar* (1969) 71 Cal.2d 525, 534, 78 Cal.Rptr. 649, 654, 455 P.2d 753, 758; *Abeles v. State Bar* (1973) 9 Cal.3d 603, 609, 108 Cal.Rptr. 359, 510 P.2d 719.)

(2) We detect a common theme in the cases relating to disqualification of attorneys by trial courts. If the status or misconduct which is urged as a ground for disqualification will have a continuing effect on the judicial proceedings which are before the court, it is justified in refusing to permit the lawyer to participate in such proceedings. Thus a disqualification is proper for conflict of interest and,

under a rule of professional conduct as it existed at the time of the opinion in *Comden v. Superior Court, supra,* when he ought to be a witness in a forthcoming trial. If, on the other hand, the court's purpose is to punish a transgression which has no substantial continuing effect on the judicial proceedings to occur in the future, neither the court's inherent power to control its proceedings nor Code of Civil Procedure section 128 can be stretched to support the disqualification.

(3) In applying this principle to the instant case, we recognize that such information as Albertini may have learned from Fatt cannot be unlearned and that, whether Albertini is or is not disqualified as counsel, he can use this information as President of Chronometrics. Still it cannot be said that the court's order served no useful purpose in exercising proper control of the proceedings before the court. As counsel, Albertini would have the improperly obtained facts instantly available in his mind in questioning witnesses, making and responding to objections and addressing the court and jury. Albertini as counsel would be in quite a different position from a substituted counsel who might acquire such information second hand by discussions with Albertini before or after court sessions or during recesses. It was not an abuse of the court's discretion to refuse to permit the wrongfully obtained information to be used by Albertini directly in the proceedings before the court. The extension of the disqualification beyond Albertini personally to his law firm has, however, no purpose but a punitive one.[3] As we have

[3] We assume that, as was reported to us by counsel at oral argument, Fatt is no longer a party to the lawsuit and we take that fact into consideration. We express no opinion as to the propriety of the

(Continued on following page)

indicated, such purposes should be accomplished through established disciplinary proceedings.

The order is modified to provide for the disqualification of Eugene J. Albertini, personally, rather than the law firm of Albertini & Gill, in this action and, as modified, the order is affirmed. Each side shall bear its own costs on appeal.

KAUS, P. J., and STEPHENS, J., concur.

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disqualification of an entire law firm in a case such as this if the opposing party wrongfully contacted remains in the action.

Appendix D-1

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Attorneys for Defendant
STANLEY H. ROEHRIG, AAL, ALC

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI'I

| | |
|---|---|
| GEORGE MIYASHIRO,<br>Plaintiff,<br>vs.<br>ROEHRIG, ROEHRIG, WILSON & HARA; STANLEY H. ROEHRIG, AAL, ALC; GLENN S. HARA, AAL; CAROL MIYASHIRO; JEFF MIYASHIRO; TITLE GUARANTY CO. | **CIVIL NO. 04-1-0211** (Hilo)<br>**AMENDED FINAL JUDGMENT**<br>(Filed Jan. 11, 2007) |

and DOE DEFENDANTS 1-100, Defendants. )

**AMENDED FINAL JUDGMENT**

Pursuant to Haw. R. Civ. P. 58, judgment is hereby entered in favor of Defendant STANLEY H. ROEHRIG, Attorney at Law, A Law Corporation and against Plaintiff GEORGE MIYASHIRO as to all claims alleged in Plaintiff's First Amended Complaint (filed on August 4, 2004).

Pursuant to Haw R. Civ. P. 58, judgment is hereby entered in favor of Defendant TITLE GUARANTY ESCROW SERVICES, INC. and against Plaintiff GEORGE MIYASHIRO as to all claims alleged in Plaintiff's First Amended Complaint (filed on August 4, 2004).

All claims against Defendants CAROL MIYASHIRO and JEFF MIYASHIRO were dismissed by notice filed pursuant to Haw. R. Civ. P. 41(a)(1)(A) on October 20, 2004.

All claims against Defendants GLENN S. HARA and ROEHRIG, ROEHRIG, WILSON & HARA were dismissed with prejudice by stipulation and order entered on September 1, 2005.

All claims not specifically identified above are hereby dismissed without prejudice.

Dated: Lihu'e, Hawai'i, JAN 11 2007.

[SEAL] /s/ George M. Masuoka
Judge of the Above-Entitled Court

Appendix D-3

APPROVED AS TO FORM:

_____

DAVID J. GIERLACH
EUGENE J. ALBERTINI
Attorneys for Plaintiff

Appendix E-1

Of Counsel:
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Attorneys for Defendants
ROEHRIG, ROEHRIG, WILSON & HARA,
and GLENN S. HARA

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT
STATE OF HAWAI'I

| | |
|---|---|
| GEORGE MIYASHIRO,<br><br>Plaintiff,<br><br>vs.<br><br>ROEHRIG, ROEHRIG, WILSON & HARA; STANLEY H. ROEHRIG, AAL, ALC; GLENN S. HARA, AAL; CAROL MIYASHIRO; JEFF MIYASHIRO; TITLE GUARANTY CO. and DOE DEFENDANTS 1-100,<br><br>Defendants. | **CIVIL NO. 04-1-0211**<br><br>ORDER DENYING WITHOUT PREJUDICE PLAINTIFF'S MOTION TO ALLOW EUGENE J. ALBERTINI TO APPEAR AS COUNSEL *PRO HAC VICE* FILED SEPTEMBER 16, 2004<br><br>Hearing Date:<br>October 11, 2004<br>Time: 11:00 a.m.<br>Judge: Ronald Ibarra<br><br>(Filed Oct. 27, 2004) |

Appendix E-2

**ORDER DENYING WITHOUT PREJUDICE PLAINTIFF'S MOTION TO ALLOW EUGENE J. ALBERTINI TO APPEAR AS COUNSEL *PRO HAC VICE* FILED SEPTEMBER 16, 2004**

Plaintiff's Motion to Allow Eugene J. Albertini to Appear as Counsel *Pro Hac Vice*, filed September 16, 2004, was heard at 11:00 a.m. on October 11, 2004, by the Honorable Ronald Ibarra. David Gierlach appeared for the Plaintiff. Eugene J. Albertini, the applicant, also appeared. Keith K. Hiraoka appeared for Defendants Roehrig, Roehrig, Wilson & Hara, Stanley H. Roehrig, AAL, ALC and Glenn S. Hara. Brian J. Delima appeared for appeared for [sic] Defendant Stanley H. Roehrig, AAL, ALC. The Court, having considered the written and oral submissions of counsel and the record and files in the case, and being otherwise fully advised, orders as follows;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion to Allow Eugene J. Albertini to Appear as Counsel *Pro Hac Vice* be and is hereby DENIED without prejudice.

Dated: Kealakekua, Hawai'i, OCT 27 2004.

/s/ Ronald Ibarra [SEAL]
Judge of the Above-Entitled Court

APPROVED AS TO FORM:

/s/ David Gierlach
DAVID J. GIERLACH
Attorney for Plaintiff

/s/ Brian DeLima
BRIAN J. DELIMA
Attorney for Defendant
STANLEY H. ROEHRIG, AAL, ALC

Of Counsel:
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and GLENN S. HARA

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Attorney for Defendant
STANLEY H. ROEHRIG, AAL, ALC

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI'I

| | |
|---|---|
| GEORGE MIYASHIRO,<br><br>Plaintiff,<br><br>vs.<br><br>ROEHRIG, ROEHRIG, WILSON & HARA, *et al.*,<br><br>Defendants. | **CIVIL NO. 04-1-0211**<br><br>**ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO ALLOW EUGENE J. ALBERTINI TO APPEAR AS COUNSEL *PRO HAC VICE*** |

Appendix F-2

) Date: April 6, 2005
) Time: 10:00 a.m.
) Judge: George M. Masuoka
) (Filed Sep. 1, 2005)

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**ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO ALLOW EUGENE J. ALBERTINI TO APPEARS AS COUNSEL *PRO HAC VICE***

Plaintiff's Motion to Allow Eugene J. Albertini to Appear as Counsel *Pro Hac Vice* was heard by the Honorable George M. Masuoka at 10:00 a.m. on Wednesday, April 6, 2005. David J. Gierlach appeared for Plaintiff GEORGE MIYASHIRO. George Miyashiro and Eugene J. Albertini attended the hearing. Brian J. De Lima appeared for Defendant STANLEY H. ROEHRIG, AAL, ALC. Keith K. Hiraoka appeared for Defendants ROEHRIG, ROEHRIG, WILSON & HARA, GLENN S. HARA and STANLEY H. ROEHRIG, AAL, ALC. Diana L. Van de Car appeared for Defendant TITLE GUARANTY ESCROW SERVICES, INC. The Court, having considered the written and oral submissions of counsel and the stipulations placed on the record by counsel and agreed to by Plaintiff George Miyashiro and by Eugene J. Albertini, enters the following order:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The motion is granted only with respect to out-of-court proceedings such as depositions, mediation and settlement negotiations. Mr. Albertini shall, as a condition precedent to his limited *pro hac vice* status, file with the Court an annual notice of compliance with Hawai'i Supreme Court Rule 1.9.

2. The motion is denied as to in-court proceedings. Mr. Albertini shall be permitted to attend hearings and other court proceedings with David J. Gierlach, but Mr. Albertini is not allowed to argue or address the Court unless the Court specifically directs a question to Mr. Albertini.

Dated: Lihu'e, Hawai'i, _____.

/s/ George M. Masuoka (seal)
Judge of the Above-Entitled Court

APPROVED AS TO FORM:

/s/ David Gierlach
DAVID J. GIERLACH
Attorney for Plaintiff

/s/ Diana L. Van de Car
DIANA L. VAN DE CAR
Attorney for Defendant
TITLE GUARANTY ESCROW SERVICE, INC.

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STANLEY H. ROEHRIG, AAL, ALC

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI'I

| | |
|---|---|
| GEORGE MIYASHIRO,<br>Plaintiff,<br>vs.<br>ROEHRIG, ROEHRIG, WILSON & HARA; STANLEY H. ROEHRIG, AAL, ALC; GLENN S. HARA, AAL; | ) **CIVIL NO.**<br>) **04-1-0211** (Hilo)<br>)<br>) **ORDER DENYING**<br>) **PLAINTIFF GEORGE**<br>) **MIYASHIRO'S**<br>) ***RENEWED*** **MOTION**<br>) **TO ALLOW EUGENE J.**<br>) **ALBERTINI TO**<br>) **APPEAR AS COUNSEL** |

Appendix G-2

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|---|---|
| CAROL MIYASHIRO; JEFF MIYASHIRO; TITLE GUARANTY CO. and DOE DEFENDANTS 1-100, Defendants. | ) ***PRO HAC VICE* WITH FULL STATUS FILED AUGUST 28, 2006**<br>) Date: September 19, 2006<br>) Time: 1:00 p.m.<br>) Judge: George M. Masuoka<br>) (Filed Nov. 13, 2006) |

**ORDER DENYING PLAINTIFF GEORGE MIYASHIRO'S *RENEWED* MOTION TO ALLOW EUGENE J. ALBERTINI TO APPEAR AS COUNSEL *PRO HAC VICE* WITH FULL STATUS FILED AUGUST 28, 2006**

Plaintiff George Miyashiro's Renewed Motion to Allow Eugene J. Albertini to Appear as Counsel *Pro Hac Vice* with Full Status, filed on August 28, 2006, was heard at 1:00 p.m. on September 19, 2006, by the Honorable George M. Masuoka. David J. Gierlach appeared for the Plaintiff, Keith K. Hiraoka appeared for Defendant Stanley H. Roehrig and Diana L. Van De Car appeared for Defendant Title Guaranty Escrow Services, Inc. The Court, having considered the written and oral submissions of counsel and the record and files in the case, and being otherwise fully advised, orders as follows;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff George Miyashiro's *Renewed* Motion to Allow Eugene J. Albertini to Appear as Counsel *Pro Hac Vice* with Full Status filed on August 28, 2006, be and is hereby DENIED.

DATED: Lihue, Hawai'i, NOV 13 2006.

[SEAL] /s/ George M. Masuoka
Judge of the above-entitled Court

APPROVED AS TO FORM:

/s/ David Gierlach
DAVID J. GIERLACH
Attorney for Plaintiff

DIANA L. VAN DE CAR
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IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

| | |
|---|---|
| GEORGE MIYASHIRO,<br>Plaintiff,<br>vs.<br>ROEHRIG, ROEHRIG, WILSON & HARA; STANLEY H. ROEHRIG, Attorney at Law, ALC; GLENN HARA, Attorney at Law; CAROL MIYASHIRO; JEFF MIYASHIRO; TITLE GUARANTY CO.; AND DOE DEFENDANTS 1-100,<br>Defendants. | ) CIVIL NO. 04-1-0211<br>) [Other Civil Action]<br>) NOTICE OF APPEAL OF AMENDED FINAL JUDGMENT, FILED JANUARY 11, 2007; EXHIBIT 1; CERTIFICATE OF SERVICE<br>) (Filed Jan. 22, 2007)<br>) TRIAL: FEBRUARY 20, 2007 |

NOTICE OF APPEAL OF AMENDED FINAL JUDGMENT, FILED JANUARY 11, 2007

NOTICE IS HEREBY GIVEN that Plaintiff George Miyashiro, by and through his undersigned counsel, and pursuant to *Hawaii Revised Statutes* § 641-11 and Rule 3 of the *Hawaii Rules of Appellate Procedure*, hereby appeals to the Supreme Court of the State of Hawaii from

the Amended Final Judgment, filed January 11, 2007, attached hereto as Exhibit 1.

DATED: Honolulu, Hawaii, January 22, 2007.

/s/ David J. Gierlach
DAVID J. GIERLACH
Attorney for Plaintiff

---

Of Counsel:
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Attorneys for Defendant
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Appendix H-3

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI'I

| | |
|---|---|
| GEORGE MIYASHIRO,<br>Plaintiff,<br>vs.<br>ROEHRIG, ROEHRIG, WILSON & HARA; STANLEY H. ROEHRIG, AAL, ALC; GLENN S. HARA, AAL; CAROL MIYASHIRO; JEFF MIYASHIRO; TITLE GUARANTY CO.; and DOE DEFENDANTS 1-100,<br>Defendants. | **CIVIL NO. 04-1-0211**<br>(Hilo)<br>**AMENDED FINAL JUDGMENT**<br>(Filed Jan. 11, 2007) |

**AMENDED FINAL JUDGMENT**

Pursuant to Haw. R. Civ. P. 58, judgment is hereby entered in favor of Defendant STANLEY H. ROEHRIG, Attorney at Law, A Law Corporation and against Plaintiff GEORGE MIYASHIRO as to all claims alleged in Plaintiff's First Amended Complaint (filed on August 4, 2004).

Pursuant to Haw. R. Civ. P. 58, judgment is hereby entered in favor of Defendant TITLE GUARANTY ESCROW SERVICES, INC. and against Plaintiff GEORGE MIYASHIRO as to all claims alleged in Plaintiff's First Amended Complaint (filed on August 4, 2004).

All claims against Defendants CAROL MIYASHIRO and JEFF MIYASHIRO were dismissed by notice filed pursuant to Haw. R. Civ. P. 41(a)(1)(A) on October 20, 2004.

Appendix H-4

All claims against Defendants GLENN S. HARA and ROEHRIG, ROEHRIG, WILSON & HARA were dismissed with prejudice by stipulation and order entered on September 1, 2005.

All claims not specifically identified above are hereby dismissed without prejudiced.

Dated: Lihu'e, Hawai'i, JAN 11 2007.

[SEAL] George M. Masuoka
Judge of the Above-Entitled Court

APPROVED AS TO FORM:

DAVID J. GIERLACH
EUGENE J. ALBERTINI
Attorneys for Plaintiff

---

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

| | |
|---|---|
| GEORGE MIYASHIRO,<br>Plaintiff,<br>vs.<br>ROEHRIG, ROEHRIG, WILSON & HARA; STANLEY H. ROEHRIG, Attorney at Law, ALC; GLENN HARA, Attorney at Law; CAROL MIYASHIRO; JEFF MIYASHIRO; TITLE GUARANTY CO.; AND DOE DEFENDANTS 1-100,<br>Defendants. | ) CIVIL NO. 04-1-0211<br>) [Other Civil Action]<br>)<br>) CERTIFICATE OF SERVICE |

Appendix H-5

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing document will be duly served by HAND DELIVERY, UNITED STATES MAIL, postage prepaid, and/or FAC-SIMILE TRANSMISSION to the parties identified below at their last known address on the date herein indicated.

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Attorney for Defendant
TITLE GUARANTY ESCROW SERVICES, INC.

DATED: Honolulu, Hawaii, January 22, 2007.

/s/ David J. Gierlach
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Attorney for Plaintiff

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Attorney for Plaintiff

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

| | |
|---|---|
| GEORGE MIYASHIRO,<br>Plaintiff,<br>vs.<br>ROEHRIG, ROEHRIG, WILSON & HARA; STANLEY H. ROEHRIG, Attorney at Law, ALC; GLENN HARA, Attorney at Law; CAROL MIYASHIRO; JEFF MIYASHIRO; TITLE GUARANTY CO.; AND DOE DEFENDANTS 1-100,<br>Defendants. | ) CIVIL NO. 04-1-0211<br>) [Other Civil Action]<br>) PLAINTIFF-APPELLANT'S STATEMENT OF POINTS ON APPEAL; CERTIFICATE OF SERVICE<br>) TRIAL: JANUARY 20, 2007 |

## PLAINTIFF-APPELLANT'S STATEMENT STATEMENT OF POINTS ON APPEAL

Plaintiff-Appellant George Miyashiro respectfully submits the points he intends to raise on appeal pursuant to Rule 10(b)(4) of the *Hawaii Rules of Appellate Procedure*. Those points of error are as follows:

1. Whether the trial court erroneously granted summary judgment in favor of Defendants herein.

2. Whether the trial court erroneously failed to grant full *pro hac vice* status to Eugene J. Albertini.

3. Whether the trial court erred in failing to disqualify the law firm of De Lima & Crudele as counsel for Defendant Stanley Roehrig.

4. Whether the trial court's ruling on Defendant Roehrig's request for attorney fees and costs was in error.

DATED: Honolulu, Hawaii, January 29, 2007.

/s/ David J. Gierlach
DAVID J. GIERLACH
Attorney for Plaintiff-Appellant

---

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

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| GEORGE MIYASHIRO,<br>Plaintiff,<br>vs.<br>ROEHRIG, ROEHRIG, WILSON & HARA; STANLEY H. ROEHRIG, Attorney at Law, ALC; GLENN HARA, Attorney at Law; CAROL MIYASHIRO; JEFF MIYASHIRO; TITLE GUARANTY CO.; AND DOE DEFENDANTS 1-100,<br>Defendants. | ) CIVIL NO. 04-1-0211<br>) [Other Civil Action]<br>)<br>) CERTIFICATE OF SERVICE |

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing document will be duly served by HAND DELIVERY, UNITED STATES MAIL, postage prepaid, and/or FACSIMILE TRANSMISSION to the parties identified below at their last known address on the date herein indicated.

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3

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In The

# Supreme Court of the United States

GEORGE MIYASHIRO,

*Petitioner,*

vs.

Honorable GEORGE M. MASUOKA, Judge in the trial court, and the SUPREME COURT OF THE STATE OF HAWAII,

*Respondents.*

**On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Hawaii**

## PETITIONER'S REPLY BRIEF TO RESPONDENT STANLEY H. ROEHRIG'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... ii

INTRODUCTION ..... 1

BACKGROUND ..... 2

REASONS FOR GRANTING THIS PETITION ..... 4

A. There Is a Recognized Right to Counsel Of Choice for Civil Litigants ..... 4

B. Roehrig States No Basis for Disqualifying Albertini for *Pro Hac Vice* Status ..... 6

C. Roehrig's Accusation About Miyashiro are False and Irrelevant ..... 7

D. Roehrig Incorrectly Asserts this Court Lacks Jurisdiction to Hear Petition ..... 8

CONCLUSION ..... 10

## TABLE OF AUTHORITIES

Page

FEDERAL CASES

Cox Broadcasting Corporation v. Cohen, 420 U.S. 469 (1975) ..... 8

Chronometrics v. Sygen, Schaeffer and Fatt, 110 Cal.App.3d 597 (1980) ..... 7

Gray v. New England Telephone and Telegraph Co., 792 F.3d 251 (1st Cir. 1986) ..... 4

Obert v. Republic Western Insurance Company, 190 F. Supp. 2d 279 (D.R.I. 2002) ..... 4, 5

Potashnick v. Port City Construction Co., 609 F.2d 1101 (5th Cir.), cert. denied, 449 U.S. 820, 101 S. Ct. 78, 66 L. Ed. 2d 22 (1980) ..... 4

Powell v. Alabama, 287 U.S. 45 (1932) ..... 4

U.S. v. Gonzalez-Lopez, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006) ..... 4, 6

## INTRODUCTION

It is fortuitous that Petitioner George Miyashiro ("Miyashiro") is able to file a reply to the "Brief of Respondent Stanley H. Roehrig in Opposition to Petition for Writ of Certiorari" (the "Opposition"). First of all, Stanley H. Roehrig ("Roehrig") is not the "Respondent" in this action and he states no basis for his alleged right to file the Opposition and his brief should be ignored.

The Opposition was not served upon Miyashiro. Someone attests that it was, but Miyashiro never received it. When no Opposition was received, Eugene Albertini ("Albertini") investigated and found the Fed. Ex. delivery had been "stolen." Albertini requested a courtesy copy from Roehrig, but was curtly refused. Miyashiro had to scramble to obtain a copy elsewhere, leaving little time for review, research and drafting of this Reply.

Roehrig tries to divert the Court's attention from the real issue here: whether Miyashiro had a constitutional right to the counsel of his choice and whether that right was violated by the actions and decisions of the courts in Hawaii, including the Supreme Court there. There *is* a constitutional right to counsel of choice even in civil cases. Many of Roehrig's arguments accentuate Miyashiro's need for counsel of his choice. Miyashiro was hampered in obtaining counsel by the refusal of most local attorneys to antagonize Roehrig. Roehrig, after agreeing to Albertini's participation in preliminary and discovery stages, decided to gain an extra advantage by precluding the most knowledgeable counsel from meaningfully participating at trial. Roehrig's actions clearly works to abridge and deny Miyashiro's constitutional rights to due process.

## BACKGROUND

The Opposition *implicitly concedes* that the Hawaii Court erred through the actions of Judge Ibarra, who did not *recuse* himself until after hearing, and denying, the Motion to Allow Albertini to appear as counsel *pro hac vice*. Judge Ibarra stated in denying the status:

> "He had been an attorney *pro hac vice* four other times in 11 years; he could still be retained as a consultant or paralegal; Gierlach is competent to handle complex trials; and Mr. Miyashiro did not show of the total bar population in the State of Hawaii that he could not obtain another lawyer to assist Gierlach in the handling of the case."

Roehrig *intentionally* tries to mislead this Court, implying that somehow the Court found that Albertini had been representing Miyashiro longer than he actually had, suggesting the representation commenced in 2002. The record shows this to be false. Albertini was never contacted until December 2003 and later did extensive research into underlying facts and supporting law, in early 2004, *not 2002 as misrepresented*. Albertini had Miyashiro ship boxes of pertinent documents to California, to be organized by Albertini & Gill ("A&G") Albertini researched the Hawaii Rules of Professional Conduct ("HRPC"), and case law relating thereto. Albertini prepared a draft of a Complaint and then met with legal malpractice expert, Randall Roth, and local counsel David Gierlach in Hawaii, to review the Complaint. Evidence clearly showed Roehrig violated no fewer than **eighteen (18) HRPC** and engaged in conduct beneath the standard of care. Albertini spent hundreds of hours developing deposition outlines, cross-examination questions and deposition summaries. In so doing. Albertini developed a font of knowledge crucial to

developing evidence for Miyashiro's case. A First Amended Complaint was filed **August 4, 2004**; the application by Albertini to appear *pro hac vice* was argued on **October 11, 2004**. Roehrig's accusation, "Albertini had consulted extensively with Miyashiro since 2002," is false and misleading.

Roehrig also asserts Miyashiro could easily have found alternative lead counsel, contacting only a dozen of more than 5,000 attorneys in Hawaii. This is another intentional misrepresentation. In fact there are only about 3,500 practicing attorneys in the state and most represent institutional clients. Miyashiro contacted more than fifty attorneys on the big island of Hawaii, and more on Oahu. Miyashiro was turned down by **every one of them**. When hiring malpractice experts, a number stated that Roehrig's malpractice was manifest, but would not risk antagonizing such a powerful man.

The refusal to allow Albertini to appear and argue in court effectively deprived Miyashiro of an essential skill developed by Albertini's extensive work and knowledge called "*knowledgeable spontaneity,*" which could have directed the Court during argument to a cogent piece of evidence, which might have changed the outcome of the Court's rulings. This skill was lost to Miyashiro by restrictions placed on Albertini's *pro hac vice* status which deprived George of his constitutional right to counsel of choice.

## REASONS FOR GRANTING THE PETITION

### A. There Is a Recognized Right to Counsel Of Choice for Civil Litigants.

*U.S. v. Gonzalez-Lopez*, 126 S. Ct. 2557 (2006), was a criminal case, but Miyashiro believes that the principles articulated therein are equally applicable to the civil litigation. The erroneous deprivation of counsel of choice at trial is just as "unquantifiable" and "indeterminate," and can potentially be just as devastating, in a civil case as in a criminal. See, *id.* 2562-2565.

The cases establishing a right to counsel of choice in civil cases were cited in the Petition and were essentially ignored by Roehrig in the Opposition. Among the cases cited was *Powell v. Alabama,* 287 U.S. 45, 64 (1932), which stated that denial of the counsel of choice can be a denial of due process in criminal **and civil** cases. The court in *Potashnick v. Port City Constr. Co.,* 609 F.2d 1101, 1118 (5th Cir. 1980), clarified "In each instance, the right to counsel is one of constitutional dimensions and **should thus be freely exercised without impingement**." (Emphasis added.) The Court in *Gray v. New England Telephone and Telegraph Co.,* 792 F.3d 251, 257 (1st Cir. 1986), explained further that the right to counsel of choice in civil cases is not identical to criminal cases, but still affects due process.

Roehrig also opines that the right to counsel of choice does not extend to out-of-state attorneys. He cites as authority *Obert v. Republic Western Insurance Company,* 190 F. Supp. 2d 279, 298 (D.R.I. 2002). Roehrig misquotes *Obert*. He asserts *Obert* holds that a civil litigant has no right to counsel of choice. The Obert decision states nothing of the kind and especially not at page 298 of the

decision, Roehrig's alleged point cite. Most of *Obert* discusses disqualification of the judge; near the end *pro hac vice* status is also discussed. *Obert* holds that there is no property right for an attorney to be admitted *pro hac vice* in Rhode Island. *Id.* The court stated, "Although counsel has no property right to admission pro hac vice, some courts have implied that once admitted pro hac vice, a lawyer must have a limited property right mandating some degree of procedural due process prior to disqualification." *Id.* The court was thus discussing an **attorney's right** to *pro hac vice* status, not a **client's constitutional right** to be represented by counsel of choice.

When the courts talk of a litigant's right to counsel of choice, there is no basis to assume it is limited solely to local counsel. That would contradict the right to choose, by limiting the choices. Roehrig cites no authority for such limitation. Rather it is inimical to the constitutional right. Where, as here, the client is unable to obtain local counsel of choice because of the influence and power of the opposing litigants, it would effectively destroy the due process rights of the litigant to limit him to choice among local counsel. Had Roehrig not been a political figure in Hawaii, there would undoubtedly not have been a denial of Miyashiro's counsel to *pro hac vice* status.

Judge Masuoka essentially relied on Judge Ibarra's improper ruling in denying the status to Albertini. Judge Ibarra ruled Miyashiro had access to many attorneys on the Island of Hawaii, as well as elsewhere in the state. Judge Ibarra was simply wrong, and the evidence submitted to him showed that Roehrig was such a substantial political figure no one wanted to handle the case. At the Hawaii Supreme Court, Roehrig argued that authorities cited by Miyashiro only applied to criminal cases, not civil.

That is incorrect. The *Gonzalez-Lopez* case was a criminal case, but other authority states the constitutional right to counsel of choice in civil cases as well. This is one reason this Court should review this matter, and clarify that the right of "*counsel of choice*," applies in ***both*** criminal and civil matters.

### B. Roehrig States No Basis for Disqualifying Albertini for *Pro Hac Vice* Status.

Roehrig also argues that Albertini was unfit to practice *pro hac vice* in Hawaii, Roehrig admits Albertini was admitted *pro hac vice* in Hawaii four (4) other times and Roehrig himself agreed to *pro hac vice* for Albertini status during the discovery stage. The Court's Order controls the basis for denying the status to Albertini, not what Roehrig's counsel argued at a hearing. In its ruling, the Court mentions the earlier *pro hac vice* representations, but does not say it was improper or that Albertini was guilty of some misconduct therein. If Albertini's actions were reprehensible (including the false allegation Albertini practiced in Hawaii without a license because of his pretrial work in California), there could have been no reason to allow his participation further, but the Court's ruled otherwise.

Actually, Roehrig found Albertini was too aggressive and effective to be allowed to conduct the trial as lead counsel. It was this that actuated Roehrig's opposition to full *pro hac vice* status for Albertini. But that is the very point Miyashiro makes here: he hired counsel, very effective and allowed to conduct discovery, draft pleadings and review documents, so developed primary knowledge of the case and had the requisite skills to prepare papers and

argue at hearings and eventually trial. The Court ignores its former conduct and forbids Albertini to participate meaningfully at trial and hearings, where his accumulated knowledge and skills are most needed.

Roehrig accuses Albertini of misconduct in the late 1970's. As evidence, he cites *Chronometrics v. Sygen, Schaeffer and Fatt,* 110 Cal.App.3d 597 (1980) and suggests this case as a basis for the denial of *pro hac vice* status. First, the trial Court never cited the *Chronometrics* decision in its denial of the status. In fact when the case and its circumstances were raised, Judge Ibarra stated, "I'm not even going to consider that." See, Court's transcript of proceedings Oct. 11, 2004, at pg. 39, lns. 4-5. Second, despite knowledge of the *Chronometrics* case, Roehrig had no problem agreeing to *pro hac vice* for discovery. Later Roehrig decided that conduct twenty-five years earlier made Albertini unfit. Roehrig did not want to bar Albertini completely, only blunt his effectiveness.

### C. Roehrig's Accusation About Miyashiro are False and Irrelevant.

Roehrig claims he knew right away Miyashiro was a crook and embezzler, but tried to help him anyway. For support, Roehrig cites to his victory in summary judgments and he even has the audacity to assert that Miyashiro has admitted being an embezzler. Of, course, the merits of Miyashiro's lawsuits wherein Roehrig represented him are irrelevant for purposes of deciding whether he had a right to counsel of his choice and whether he was improperly deprived of that right here. Roehrig's version of the events would be laughable if the consequences of it were not so tragic. Miyashiro was not an embezzler and,

despite Roehrig's accusations, there is no evidence that he was, regardless of what the rulings on summary judgments may claim; Miyashiro never admitted being an embezzler.

### D. Roehrig Incorrectly Asserts this Court Lacks Jurisdiction to Hear Petition.

Roehrig lacks standing to appear here, but because of rulings on summary judgment motions and appeal from them by Miyashiro, he claims this Court lacks jurisdiction to hear Miyashiro's Petition. Roehrig further asserts the ruling on the Petition for Writ of Mandamus by the Supreme Court of Hawaii is not final, because of this appeal. Miyashiro has appealed the rulings on the summary judgment motions and mentioned denial of *pro hac vice* status therein. At issue here, however, is the denial of Mandamus by the Hawaii Supreme Court. That cannot be at issue in the appeal. Only the denial of the application for *pro hac vice* status by the trial court will be at issue. It is ingenuous for Roehrig to suggest, as he does, that an appellate court will be able to reverse the Supreme Court of Hawaii. The ruling of the Hawaii Supreme Court is effectively final. To be clear, procedurally, the Hawaii Supreme Court's decision cannot be reversed through the appeal; it is now final and must be addressed by this Court.

Even assuming Roehrig were right about the denial of the status and its part in the appeal, Roehrig himself cites several cases, including *Cox Broadcasting Corporation v. Cohen,* 420 U.S. 469 (1975), which list exceptions to the "final judgment rule" that, where "anything further remains to be determined by a state court" this Court will

not entertain jurisdiction. As pointed out, nothing further remains to be done regarding the denial of Mandamus by the Hawaii Supreme Court, but any or most of the exceptions can apply here: (1) "case where the ruling renders further State proceedings preordained" – this is certainly the case here, where future proceedings must be preordained to the extent that Albertini will be allowed to participate *pro hac vice*; (2) "case where the issue will survive and require decision regardless of further State proceedings" – as already explained, the appeals cannot lead to overturning the denial of the Writ of Mandamus, so it will remain to be done by this Court regardless of what happens; (3) "cases where further State proceedings will bar review of an important federal issue" – the right to counsel of choice in civil cases is an important federal issue, as it goes to the heart of constitutional rights, including equal protection, as, at least in some parts of the country, civil litigants do have a right to counsel of their choice, whereas in Hawaii, the highest court does not recognize it, meaning disparate treatment and the defeat of equal protections, so if the denial of the Writ is overturned this important issue could be barred; and (4) "cases where resolution of the Federal issue will be preclusive of any further State proceedings" – this Court's ruling would be preclusive of further proceedings on this issue.

## CONCLUSION

George Miyashiro is only asking for justice and fair play. That the great Stanley Roehrig and his cronies are so intent in denying Miyashiro his rights is most unsettling and strongly indicates that the intervention of this Court is necessary. George Miyashiro respectfully requests that this Court accept his Petition for Certiorari and grant full review by this Court.

March 24, 2007

Respectfully submitted,

GEORGE MIYASHIRO, *Petitioner*
*In propria persona*